

Volume 12

Pages 2450 - 2611

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

ORACLE AMERICA, INC.,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. C 10-3561 WHA
	)	
GOOGLE, INC.,	)	
	)	
Defendant.	)	San Francisco, California
	)	April 30, 2012

**TRANSCRIPT OF JURY TRIAL PROCEEDINGS**

**APPEARANCES:**

<b>For Plaintiff:</b>	MORRISON & FOERSTER 755 Page Mill Road Palo Alto, California 94304
<b>BY:</b>	<b>MICHAEL A. JACOBS, ESQUIRE</b> <b>KENNETH A. KUWAYTI, ESQUIRE</b> <b>MARC DAVID PETERS, ESQUIRE</b> <b>DANIEL P. MUINO, ESQUIRE</b>
	BOIES, SCHILLER & FLEXNER 333 Main Street Armonk, New York 10504
<b>BY:</b>	<b>DAVID BOIES, ESQUIRE</b> <b>ALANNA RUTHERFORD, ESQUIRE</b>

(Appearances continued on next page)

***Reported By: Katherine Powell Sullivan, RPR, CRR, CSR #5812***  
***Debra L. Pas, RMR, CRR, CSR #11916***  
***Official Reporters - U.S. District Court***

***Katherine Powell Sullivan, CSR, CRR, RPR***  
***Debra L. Pas, CSR, CRR, RMR***  
***Official Reporters - US District Court - 415-794-6659***

**APPEARANCES (CONTINUED):**

**For Plaintiff:**

BOIES, SCHILLER & FLEXNER  
1999 Harrison Street, Suite 900  
Oakland, California 94612  
**BY: WILLIAM FRED NORTON, ESQUIRE**  
**STEVEN C. HOLTZMAN, ESQUIRE**

ORACLE AMERICA, INC.  
500 Oracle Parkway  
Redwood Shores, California 94065  
**BY: ANDREW C. TEMKIN, CORPORATE COUNSEL**  
**DORIAN DALEY, GENERAL COUNSEL**

**For Defendant:**

KEKER & VAN NEST  
633 Battery Street  
San Francisco, California 94111-1809  
**BY: ROBERT ADDY VAN NEST, ESQUIRE**  
**CHRISTA MARTINE ANDERSON, ESQUIRE**  
**DANIEL PURCELL, ESQUIRE**  
**MICHAEL S. KWUN, ESQUIRE**

KING & SPALDING LLP  
1185 Avenue of the Americas  
New York, New York 10036-4003  
**BY: BRUCE W. BABER, ESQUIRE**

GOOGLE, INC.  
1600 Amphitheatre Parkway  
Mountain View, California 94043  
**BY: RENNY HWANG, LITIGATION COUNSEL**

**For Dr. Kearl:**

FARELLA BRAUN & MARTEL LLP  
235 Montgomery Street, 30th floor  
San Francisco, California 94104  
**BY: JOHN L. COOPER, ESQUIRE**

**Also Present:**

**SAFRA CATZ, President and CFO**  
Oracle Corporate Representative

**CATHERINE LACAVERA**  
Google Corporate Representative

- - -

P R O C E E D I N G S

APRIL 30, 2012

7:30 a.m.

(Proceedings held in open court, outside  
the presence and hearing of the jury.)

**THE COURT:** So good morning again. I received your comments on the final version of the jury instructions. So here is what -- the best way to go through this is, I will go through some, I would call them minor edits that I'm going to make, but most of these are denied. Most of your objections are denied and we're not even going to argue them this morning unless I make a change, then I'll let you argue against the change.

But all good things must come to an end. So we're just going to get started.

So on page -- there are a few very minor things that I am going to change, but -- well, possibly I guess I should go over it. I'm going to make minor changes to No. 25, but it won't change -- it's just for grammatical corrections. So I'm not going to give you those now. I'll give it to you in writing.

No. 26 I'm changing the phrase "the public" to "anyone," which I had meant to do but neglected to do.

On No. 27, I'm going to add this sentence:

"To be clear, with respect to a different

1           issue. The parties are in agreement that the  
2           Structure, Sequence and Organization of the  
3           API packages is more than diminimus."

4           I think you all agree with that, don't you?

5           **MR. JACOBS:** Yes, your Honor.

6           **MR. VAN NEST:** Yes, your Honor.

7           **THE COURT:** All right.

8           Next on 29 I had italicized the word "all," but I  
9           guess I'm not going to italicize that now, so that will go back  
10          to normal font.

11          Paragraph 30, around Line 18 I'm going to change it  
12          to read -- instead of saying, "There is no issue for you to  
13          decide," I'm going to say, "but the parties agree that the  
14          issue is for me to decide."

15          And then take out the sentence that starts, "Again  
16          Google makes no contention," et cetera, et cetera. And simply  
17          say, "This statement of law regarding licenses is simply to put  
18          some of the evidence you heard in context."

19          I forgot who asked for that, but that was a good  
20          change.

21          **MR. VAN NEST:** Excuse me, your Honor. Can you read  
22          the --

23          **THE COURT:** I will. I will read it to you the way it  
24          will -- I will start at Line 18 in the middle of the  
25          sentence -- or 17 in the middle of the sentence:

1 "The burden would be on Google to prove such  
2 a public dedications, but the parties agree  
3 that the issue is for me to decide. This  
4 statement of the law regarding licenses is  
5 simply to put some of the evidence you heard  
6 in context."

7 Then on the special verdict form on question three  
8 under the word "Yes," I'll put in parentheses "Infringing."  
9 Under the word "no," "Not infringing" just for clarity.

10 And then under the special interrogatory, the very  
11 last sentence -- two sentences would read:

12 "Your answers to questions 4-A and 4-B  
13 will be used by the judge with issues he must  
14 decide. Questions 4-A and 4-B do not bear on  
15 the issues you must decide on questions 1 to  
16 3."

17 All right? If anyone has extreme heartburn over  
18 anything I've just said, please let me know.

19 **MR. VAN NEST:** None here, your Honor.

20 **THE COURT:** And I'm going to try to give you a --

21 **MR. JACOBS:** No, your Honor.

22 **THE COURT:** Thank you.

23 I'm going to give you a cleaned up copy with these  
24 changes so you can use them in your close.

25 **MR. VAN NEST:** Your Honor, could we possibly get

1 that, as we have been, in electronic form so we can put them  
2 into the slides? Is that possible?

3 **THE COURT:** All right.

4 **MR. VAN NEST:** Thank you so much.

5 **THE COURT:** All right. Now, Dawn, can you -- Dawn  
6 has told me that -- who it is that's a juror?

7 **THE CLERK:** Jennifer Michals.

8 **THE COURT:** Ms. Michals, who sits in the back row, is  
9 anxious and wants to stop jury service and it's, apparently,  
10 complicating her life. I think we ought to bring her out and  
11 ask her some questions. She's here now.

12 Any objection?

13 **MR. JACOBS:** No, your Honor. I just -- it may be, if  
14 we could adopt our sidebar approach that we did with the other  
15 juror who had some personal issues, it may make it easier for  
16 her to speak freely.

17 **THE COURT:** Well, let me see. If she wants to do  
18 that, I'll let her do that, but I need -- I'm going to let her  
19 ask for that, first.

20 All right. Let's bring Ms. Michals out.

21 **MR. KWUN:** Your Honor, before we do that. There is  
22 one small matter in the transcript that I would like to address  
23 your Honor on, which is that on day three of the transcript,  
24 April 18th, the transcript reflects that Trial Exhibit 1041,  
25 which is the designation of Larry Page's deposition excerpts

1 that were played on the 17th, the transcript reflects that it  
2 was received into evidence, although the parties are in  
3 agreement that the marked depo excerpts shouldn't be received  
4 into evidence and they weren't actually moved into evidence.  
5 So I would just to clarify for the record that they are not in  
6 evidence.

7 **THE COURT:** Both sides agree to that?

8 **MR. JACOBS:** That's the procedure you had directed,  
9 your Honor.

10 **THE COURT:** All right. So what's the exhibit number?

11 **MR. KWUN:** It's Exhibit 1041, which was marked for  
12 identification. It's the deposition excerpts of Larry Page  
13 that were played on April 17th. The correction would be that  
14 the transcript at Page 434, Line 16 where it notes in a  
15 parenthetical that it was received into evidence.

16 **THE COURT:** The way to do this, I think, is we have  
17 to leave the record as it is on the court reporters'  
18 transcript, but we will now have a subsequent record on the  
19 court reporters' transcript that says that Exhibit No. 1041 is  
20 not received in evidence, but only marked for purposes of the  
21 record for purposes of appeal.

22 So my Deputy Clerk will correct our clerk's record,  
23 1041 not in evidence.

24 All right? Does that suit you?

25 **MR. KWUN:** Thank you, your Honor.

1           **THE COURT:** Okay. I did have a few more questions I  
2 wanted to ask you, but let's bring Ms. Michals out. Is she  
3 here?

4           (Juror Michals enters the courtroom.)

5           **THE COURT:** Ms. Michals, welcome. We need to give  
6 her the microphone.

7           **JUROR MICHALS:** There is an audience.

8           **THE COURT:** Yes. This is a public trial.

9           **JUROR MICHALS:** Okay.

10          **THE COURT:** Do you want to do this privately at the  
11 sidebar?

12          **JUROR MICHALS:** Yes.

13          **THE COURT:** All right. We will do that.

14          (Whereupon, the following proceedings  
15 were held at side bar.)

16          **THE COURT:** Ms. Michals, I need to let you know this  
17 is a public transcript, so everyone in the world can read this,  
18 but the public won't hear it right now.

19          **JUROR MICHALS:** Okay.

20          **THE COURT:** What is the issue?

21          **JUROR MICHALS:** Okay, so I'm a nurse. I'm a new  
22 nurse. I don't know if you know that. I just got this job in  
23 September. I entered into a training program and I'm on my own  
24 since the end of January. So when I got called I thought, this  
25 would be a great opportunity to see how the whole system works.



1 I really thought about it a lot.

2 And then by -- it's proven to be difficult to keep up  
3 my skills and work, come here five days a week and work one  
4 day, a 12-hour shift on a weekend. And I feel like I'm not  
5 paying attention here and I'm not paying attention there.

6 But -- I don't know if you know, but at Stanford  
7 where I work, at the Stanford Hospital, we have the sickest  
8 children in the country. We have -- our floor unit is intense  
9 as a PICU, an intensive care unit in another hospital. So I'm  
10 new at this.

11 I have been on my own for, I don't know, since the  
12 end of January. I'm just having anxiety about my job basically  
13 and I know -- I just don't want to set a precedent for letting  
14 people go. I understand that. But I just am having a real  
15 hard time in general.

16 And that's my thoughts. And I know it puts everyone  
17 out. But I just, it just can't make -- it is not like I go sit  
18 down at a desk. I can't make a mistake with these kids. This  
19 is not an option.

20 **THE COURT:** Well, who says that you have to work on  
21 weekends to --

22 **JUROR MICHALS:** Nobody says I do, but the thing is,  
23 is that because I'm new at this, if I don't work on the  
24 weekends and keep my skills up, I'm going to be back where I  
25 started in September. And this program that I entered into at

1 Stanford, it's like there are 900 applicants. I was one of 20.  
2 They put all this money into training me. I just feel like --

3 **THE COURT:** Are they threatening to fire you or  
4 something?

5 **JUROR MICHALS:** No, no, no, no.

6 **THE COURT:** Do you want me to have the head of the  
7 company come in? I will be happy to bring them in and explain  
8 your duty.

9 **JUROR MICHALS:** No, no. No, not at all.

10 **THE COURT:** Why didn't you think of this before you  
11 signed up? You could have told me that this would interfere  
12 with your ability to serve as a juror. The lawyers relied upon  
13 your ability to serve.

14 **JUROR MICHALS:** I thought about it a lot. And I  
15 thought my perception was that it would be okay, that that  
16 would be enough; that one day extra a week would be sufficient,  
17 but what I'm saying is it's not.

18 **THE COURT:** Well, who should that burden fall on?  
19 You or the system? The U.S. District Court has relied upon  
20 your availability. You had ample opportunity to bring all this  
21 up.

22 **JUROR MICHALS:** Yeah. I know that.

23 **THE COURT:** And if you had, maybe you would have been  
24 excused, but you didn't bring it up. We have relied upon your  
25 availability.

1           **JUROR MICHALS:** I don't -- I don't come to you and  
2 make loosely and flippantly. I've thought about this a lot and  
3 it's -- and I realize it is -- you're right, whose burden is  
4 it? And it's totally mine. Misperception of what I'm capable.  
5 And that's my fault, I agree.

6           **THE COURT:** Let me ask you this: Are you able to  
7 complete the first phase of this trial and participate with the  
8 jury on deciding the first phase of this trial? And I'm not  
9 saying I would let you off after the first phase, but that  
10 means going through --

11           **JUROR MICHALS:** Deciding phase.

12           **THE COURT:** (Continuing) -- deciding this first  
13 phase?

14           **JUROR MICHALS:** Yeah.

15           **THE COURT:** I'm sorry?

16           **JUROR MICHALS:** Yes.

17           And I understand you're not letting me off and that  
18 you -- you are probably thinking about it. And I -- I'm not --  
19 you know, I don't take it lightly. I understand this is a big,  
20 huge deal for everyone involved and everyone's lives. And I --  
21 I have to do what's best for my job at this point.

22           **THE COURT:** Well --

23           **JUROR MICHALS:** And I --

24           **THE COURT:** Yes, you have to do what's best for you,  
25 except for the fact that you have made some commitments that we

1 must ask you to honor. You know, it's like when somebody gets  
2 drafted into the Army. They don't get to go to the coffee shop  
3 and say, "Gee, wouldn't it be better if I was back working at  
4 my old job?" You know, they are in for the duration.

5 **MR. KWUN:** I hear you. I hear you.

6 **THE COURT:** So this is like being drafted into the  
7 Army, so to speak.

8 **JUROR MICHALS:** Hmm-hmm.

9 **THE COURT:** Here is what -- it is important for me to  
10 know that you will pay attention and do your duty as a juror.

11 **JUROR MICHALS:** Uh-huh.

12 **THE COURT:** At least through the end of the verdict  
13 on the first phase of this trial.

14 **JUROR MICHALS:** Yes, I will.

15 **THE COURT:** All right. I will take it up after the  
16 first phase of this trial.

17 **JUROR MICHALS:** Okay. Fair enough.

18 **THE COURT:** Let me ask counsel, do they have any  
19 questions?

20 **MR. JACOBS:** No.

21 **MR. VAN NEST:** No, your Honor.

22 **THE COURT:** Don't talk about the other jurors about  
23 this. I don't want them to even know it is an issue. And we  
24 will take it up, if you feel the same way, at the end of the  
25 verdict, we will revisit this.

1           **JUROR MICHALS:** Okay.

2           **THE COURT:** And I will keep an open mind about it,  
3 but you must keep an open mind about it, too. And I'm not  
4 saying that I would let you off, but I'm not saying I won't  
5 either. I want to look at it at that point, all right.

6           **JUROR MICHALS:** All right. Fair enough.

7           **THE COURT:** Okay.

8           **JUROR MICHALS:** Thanks guys.

9           (Whereupon, the following proceedings were  
10 held in open court, in the presence and  
11 hearing of the jury.)

12           **THE COURT:** All right. I am going to read the first  
13 third of the instructions before the close and then save the  
14 two-thirds of it for after the close, but the part about  
15 burdens of proof and weighing the evidence, I want do that  
16 before you start your close.

17           I have a question that occurred to me in drafting the  
18 special verdict form. On those Impl files, is it true that the  
19 entire file was copied. Yes?

20           Mr. Baber, you know everything. Isn't it true that  
21 the entire file was copied?

22           **MR. BABER:** I believe the evidence shows, your Honor,  
23 that the source code files appear to have been derived from  
24 decompiled versions of the bytecode which would have been  
25 included the source code from those files, but not the

1 comments. So depending on your compilable code definition.

2 **THE COURT:** But wouldn't 100 percent of the  
3 compilable code have been reconstructed from the object code?

4 **MR. BABER:** I believe that's what the evidence shows.

5 **THE COURT:** So isn't that a hard argument for you to  
6 make that it's diminimus?

7 **MR. BABER:** It's a qualitative argument, your Honor,  
8 but Mr. Van Nest will --

9 **MR. VAN NEST:** The argument would be qualitative,  
10 your Honor.

11 Those files, as Dr. Mitchell admitted, he couldn't  
12 find any evidence they had ever appeared on a handset. It's  
13 similar to the source code comments. Yes, they are -- appear  
14 to be copies, but they are qualitatively minimal. It's not  
15 strictly a numbers count. It's qualitative and quantitative.

16 **THE COURT:** But I told the jury that they must make a  
17 comparison against the entire file from which they were copied,  
18 but in this case it is the entire file.

19 I just want you to know I'm going to listen carefully  
20 to how you pitch the argument and I may revise the instructions  
21 if I feel that you're trying to escape what seems to me to be  
22 something that we maybe ought to direct a verdict on.

23 **MR. VAN NEST:** You have warned us of that and I'm  
24 well aware of it, your Honor.

25 **THE COURT:** All right. That is one of the most minor

1 issues in any trial I have ever seen. I don't know why those  
2 issues -- those items are even still in play, but both sides, I  
3 guess, want them in play.

4 All right. I've run out of things. I'm ready to  
5 proceed.

6 **MR. JACOBS:** Your Honor, a few housekeeping items.

7 **THE COURT:** Yes, please. What is the housekeeping  
8 matter?

9 **MR. JACOBS:** We have a joint list of admitted trial  
10 exhibits that the parties have prepared.

11 **THE COURT:** This is for the jury's use?

12 **MR. JACOBS:** Yes.

13 **THE COURT:** Thank you. Is this agreed to,  
14 Mr. Van Nest?

15 **MR. VAN NEST:** Yes, it is, your Honor.

16 **THE COURT:** Wonderful. We will take that into the  
17 jury room when the exhibits go in.

18 **MR. JACOBS:** The next document, your Honor, is an  
19 agreed list of translating from the deposition exhibits to the  
20 trial exhibits.

21 **THE COURT:** That's also good.

22 Can I see that? We might want -- let me see what the  
23 form of that is.

24 (Whereupon, document was tendered  
25 to the Court.)

1           **THE COURT:** Can we just send this in without  
2 explanation along with the joint list? Is that all right with  
3 both sides?

4           **MR. JACOBS:** Yes, your Honor.

5           **MR. VAN NEST:** That's fine, your Honor.

6           **THE COURT:** All right. I think it's satisfactorily  
7 explanatory, so Dawn will do that. Okay?

8           **MR. JACOBS:** And then for the record, TX 1090 is our  
9 clips of Dr. Astrachan's deposition. TX 1091 is for Agarwal.  
10 TX 1092 is for Bloch, and TX 1093 are demonstratives that were  
11 used with Dr. Mitchell.

12           **THE COURT:** All right. Are all the jurors present,  
13 Dawn?

14           **THE CLERK:** I don't. Let me go check.

15           **THE COURT:** While we have a moment, I want to thank  
16 you, the members of the public and press out there. I think  
17 you have been pretty good about remaining as quiet as possible.

18           It's very important that the lawyers have the  
19 attention of the jury, meaning that when they are performing or  
20 asking questions or, in this case, giving their closing  
21 arguments, it's very important that there be no distractions so  
22 that the precious minutes that they have are used effectively  
23 with the jury. So I ask for your continued cooperation on that  
24 point.

25           Now, I have noticed over the years that sometimes



1 members of the public don't like to sit through jury  
2 instructions. That's fine. But, when I'm reading them, you've  
3 got to either get up and leave or sit there and listen, but you  
4 can't leave during the jury instructions. Some judges in this  
5 courthouse lock the door so no one can come in and no one goes  
6 out, because this is the one moment that the jury learns the  
7 law and you don't want distractions there either.

8           So if you want to get up and leave, I'm going to ask  
9 you to do that very quickly before we get started with reading  
10 these instructions. It will probably take about 10 to 12  
11 minutes for this part. So it's not that long. Nonetheless,  
12 if -- there are so many of you that if even 10 of you started  
13 to get up and leave, you can see what a disturbance that would  
14 make.

15           Dawn, are we ready?

16           **THE CLERK:** Yes.

17           **THE COURT:** All right. The jury is ready so we will  
18 proceed.

19           (Jury enters courtroom at 7:54 a.m.)

20           **THE COURT:** Welcome back. Please be seated. Hope  
21 you all had a great weekend and are recharged and ready to go.

22           So here is our plan for the day. I'm going to start  
23 out by reading to you 10 to 12 minutes of jury instructions  
24 that deal with issues of burden of proof and what is evidence,  
25 what is not evidence. And these are part of the jury

1 instructions, about one-third of the jury instructions, and  
2 then I will stop that. I will get right up to the point where  
3 I'm about to tell you what the law is that governs these  
4 substantive claims and defenses, but I will stop short of that,  
5 turn it over to the lawyers for several hours. You will then  
6 hear their closing arguments, and then I will finish the jury  
7 instructions, then it will go to you for decision.

8 And it's up to you how long you want to deliberate or  
9 need to deliberate. Remember now, your verdict must be  
10 unanimous, meaning 100 percent.

11 So in that connection, are you all able to stay past  
12 1:00 o'clock today? Is there anyone who cannot?

13 (Some jurors respond negatively.)

14 **THE COURT:** Okay. So we will break at 1:00 o'clock,  
15 just as normal. If you cannot stay past 1:00 o'clock, then it  
16 may take longer. It may take more days for you to deliberate,  
17 but that's okay. We understand and we will -- we'll stop at  
18 1:00 o'clock today.

19 So I will start now with these, the reading of the  
20 instructions. And, again, this part will take about 10 to 12  
21 minutes.

22 **PRELIMINARY JURY INSTRUCTIONS**

23 **THE COURT:** Members of the jury, it is now time for  
24 me to give you the final instructions, including instructions  
25 on the law that governs this case. A copy of these

1 instructions will be available in the jury room for you to  
2 consult as necessary.

3           It is your duty to find the facts from all the  
4 evidence and to decide whether the side with the burden of  
5 proof has carried that burden, applying the elements of proof  
6 required by the law, the elements I will provide you in a  
7 moment.

8           In following my instructions, you must follow all of  
9 them and not single out some and ignore others. You must not  
10 read into these instructions or into anything the Court may  
11 have said or done as suggesting what verdict you should return.  
12 That is a matter entirely up to you.

13           Now, the evidence from which you are to decide what  
14 the facts are consists of:

15           First, The sworn testimony of witnesses, whether  
16 presented in person or by depositions;

17           Secondly, The exhibits received into evidence; and

18           Third, Any stipulated facts or facts I've told you  
19 were deemed to be evidence.

20           Certain things, however, are not evidence and you may  
21 not consider them in deciding what the facts are. I will list  
22 those for you.

23           Arguments, statements and objections by lawyers are  
24 not evidence. I will repeat that. Arguments, statements and  
25 objections by lawyers are not evidence. The lawyers are not

1 witnesses. What they have said in their opening statements,  
2 closing arguments and at other times is intended to help you  
3 interpret the evidence, but it is not evidence itself. If the  
4 facts as you remember them differ from the way the lawyers have  
5 stated them, your memory of them controls.

6 A suggestion in a question by counsel or the Court is  
7 not evidence, unless it is adopted by the answer. A question  
8 by itself is not evidence. Consider it only to the extent it  
9 is adopted by the answer.

10 Testimony or exhibits that have been excluded or  
11 stricken or that you have been instructed to disregard are not  
12 evidence and you must not -- and must not be considered.

13 In addition, some testimony and exhibits have been  
14 received only for a limited purpose. Where I have given a  
15 limiting instruction, you must follow it.

16 Anything you may have seen or heard when the Court  
17 was not in session is not evidence.

18 Now, evidence may be direct or circumstantial.  
19 Direct evidence is direct proof of a fact, such as testimony by  
20 a witness about what that witness personally saw, or heard, or  
21 did. Circumstantial evidence is proof of one or more facts  
22 from which you could find another fact. By way of example, if  
23 you wake up in the morning and see that the sidewalk is wet,  
24 you may find from that fact that it rained during the night.  
25 However, other evidence, such as a turned-on garden hose, may

1 explain the presence of water on the sidewalk. Therefore,  
2 before you decide that a fact has been proved by circumstantial  
3 evidence, you must consider all of the evidence in light of  
4 reason, experience and common sense. You should consider both  
5 kinds of evidence. The law makes no distinction between the  
6 weight to be given to either direct or circumstantial evidence.  
7 It is for you to decide how much weight to give any evidence.

8 In deciding the facts in this case, you may have to  
9 decide which testimony to believe and which testimony not to  
10 believe. You may believe everything a witness says, or part of  
11 it, or none of it. In considering the testimony of any  
12 witnesses, you may take into account:

13 The opportunity and ability of the witness to see or  
14 hear or know the things testified to;

15 The witness' memory;

16 The witness' manner while testifying;

17 The witness' interest in the outcome of the case and  
18 any bias or prejudice;

19 Whether other evidence contradicted the witness'  
20 testimony;

21 The reasonableness of the witness' testimony in light  
22 of all the evidence;

23 And any other factors that you think bear on  
24 believability.

25 You are not required to decide any issue according to

1 the testimony of a number of witnesses, which does not convince  
2 you, as the testimony of a smaller number or other evidence  
3 which is more convincing to you. The testimony of one witness  
4 worthy of belief is sufficient to prove any fact. This does  
5 not mean that you are free to disregard the testimony of any  
6 witness merely from caprice or prejudice, or from a desire to  
7 favor either side. It does mean that you must not decide  
8 anything by simply counting the number of witnesses who have  
9 testified on the opposing sides. The test is not the number of  
10 witnesses, but is the convincing force of the evidence. You  
11 should base your decision on all the evidence regardless of  
12 which party presented it.

13 A witness may be discredited or impeached by  
14 contradictory evidence or by evidence that at some time, other  
15 time the witness has said or done something or failed to say or  
16 do something that is inconsistent with the witness' present  
17 testimony. If you believe that any witness has been impeached  
18 and thus discredited, you may give the testimony of that  
19 witness such credibility, if any, you think it deserves.

20 Discrepancies in a witness' testimony or between a  
21 witness' testimony and that of other witnesses do not  
22 necessarily mean that such witness should be discredited.  
23 Inability to recall and innocent misrecollection are common.  
24 Two persons witnessing an incident or transaction sometimes  
25 will see or hear it differently. Whether a discrepancy

1 pertains to an important matter or only to something trivial  
2 should be considered by you.

3           However, a witness wilfully false in one part of his  
4 or her testimony is to be distrusted in others. You may reject  
5 the entire testimony of a witness who willfully has testified  
6 falsely on a material point, unless from all the evidence, you  
7 believe that the probability of truth favors his or her  
8 testimony in other particulars.

9           In determining what inferences to draw from evidence  
10 you may consider, among other things, a party's failure to  
11 explain or deny such evidence.

12           Now, certain charts and summaries have been received  
13 into evidence. Charts and summaries are only as good as the  
14 underlying supporting testimony or material. You should,  
15 therefore, give them only such weight as you think the  
16 underlying material deserves.

17           Now, I will address the burden of proof. In this  
18 case the preponderance of the evidence standard applies on all  
19 sides. So whoever has the burden of proof on an issue must  
20 carry that issue by a preponderance of the evidence. I'm going  
21 to repeat that phrase. Preponderance of the evidence.

22           When a party has the burden of proof on any claim by  
23 a preponderance of the evidence, it means you must be persuaded  
24 by the evidence that the claim is more probably true than not  
25 true. To put it differently, if you were to put the evidence

1 favoring a plaintiff and the evidence favoring a defendant on  
2 opposite sides of the scale, the party with the burden of proof  
3 on the issue would have to make the scale tip somewhat toward  
4 its side. Somewhat toward its side. If the party fails to  
5 meet this burden, then the party with the burden of proof loses  
6 on the issue. Preponderance of the evidence basically means  
7 more likely than not.

8           On any claim if you find that plaintiff carried its  
9 burden as to each element of a particular claim, your verdict  
10 should be for the plaintiff on that claim. If you find that  
11 plaintiff did not carry its burden of proof as to each element,  
12 you must find against plaintiff on that claim. The same  
13 principle also applies to defendants on claims or defenses for  
14 which it has the burden of proof.

15           All right. So that is where we will pause in the  
16 reading of the instructions.

17           And I remind you how these closing arguments are  
18 structured. The burden of proof being on the plaintiff, the  
19 plaintiff has the right to open and close the summations;  
20 meaning counsel for plaintiff gets to go first. And then after  
21 the defense puts on its entire closing argument, the plaintiff  
22 counsel gets to come back and to rebut, and then that is the  
23 end of the close. But both sides have the same amount of  
24 overall time, which is 90 minutes per side. And then at the  
25 end of all of that, I will give you the final, the rest of the



1 instructions.

2 Please remember that nothing that is said by counsel  
3 in these closing arguments constitutes evidence at all, but it  
4 is an important opportunity for the lawyers to try to explain  
5 to you what they think has or has not been proven in the case.  
6 So I know you will give them your closest possible attention.

7 So who will begin? All right. On behalf of Oracle  
8 America, the plaintiff in the case, Mr. Jacobs will now give  
9 the closing summation. The floor is yours.

10 **CLOSING ARGUMENT**

11 **MR. JACOBS:** Good morning. I want to begin again by  
12 thanking you for your service on this jury. We, of course,  
13 have been keeping an eye on you during the trial. We know you  
14 have been paying very close attention and we appreciate that.  
15 The evidence has sometimes been complex, technical. We know  
16 you have been taking notes and being thoughtful and preparing  
17 for this moment, for the close and then for your deliberations.

18 But I want to thank you for another reason. This is  
19 a trial between large companies over really important business  
20 issues. Sometimes the numbers have been staggering, whether  
21 it's the number of lines of code, or the number of Android  
22 devices activated today, or even the dollar amounts involved.  
23 And it can seem a little remote from our everyday lives to be  
24 thinking about these enterprises and their intellectual  
25 property conflicts.

1 But the way the system works is we gather people from  
2 all walks of life, from all backgrounds, regardless of gender,  
3 age, where you came from, whether you speak English as a first  
4 language or as a fourth language, and under the Constitution  
5 people like us decide these Titanic questions. And so as you  
6 have been watching this trial and have been sitting there  
7 thinking big companies and great issues, and I just want to  
8 thank you again for how careful you have been following along  
9 on this kind of important dispute.

10 And when I began the trial I said, actually the issue  
11 is pretty simple, and it is pretty simple. It's something that  
12 all of us can relate to. The basic question is: Can somebody  
13 use another company's property, another person's property  
14 without permission because it suits them? And that's pretty  
15 basic. We can all relate to that. That's about whether  
16 someone could camp on our land without our permission, or use  
17 our bathrooms without our permission. It's kind of a very  
18 basing fundamental question. Notwithstanding the technology,  
19 notwithstanding the fact that we're talking about copyrights in  
20 this phase. It's a pretty straightforward question that  
21 ordinary citizens who may not be close to -- may not have  
22 executive experience in large corporations are fully equipped  
23 to address.

24 And what I want to do today in this summation or  
25 closing statement is walking through the evidence, give you the

1 tools that you will need when you go back to the jury room to  
2 deliberate.

3 Now, as I said, the case is about one company  
4 deciding to use another company's property without permission.  
5 And we heard early on in the trial what the basic -- how the  
6 dispute basically arose. And the way it arose was that there  
7 were negotiations between Sun and Google, and Google wanted to  
8 use Java intellectual property in Android, and Google wanted to  
9 use it in a way that Sun was not willing to agree to, and  
10 Google pressed.

11 And Mr. Rubin's testimony was quite clear on the  
12 point. What did Google want Sun to do? Google wanted Sun to  
13 throw away their standard license, because it isn't what Google  
14 was asking for, and they needed to develop a new license that  
15 was specifically what we're asking for. And he acknowledged  
16 that what Google was asking Sun to do was basically change  
17 their business model. And he had an idea to open source in a  
18 way that Sun wasn't going to open source. You now know so much  
19 about open source licensing.

20 And he said, "We asked them, 'Why don't you make it  
21 available for free to the world as part of our Android platform  
22 and in return we will pay you a little bit of money to do that,  
23 so you guys can go and create some derivative of your business  
24 model.'" A little pat on the head.

25 So now we know how this dispute evolved, because Sun

1 said no. Sun said, We want to stick with our business model.  
2 It's important to us. Java is important to us. "Write once,  
3 run anywhere" is important to us and you're going to disturb  
4 that model. And so Sun said no, and the disagreement  
5 persisted, and here we are.

6 As a result of the trial, we now know a great deal  
7 more about the property that's in question. We know that we're  
8 talking about copyrights. We talked at the beginning about how  
9 important copyrights are and how copyrights are in the  
10 Constitution.

11 And now, again, back to our everyday lives. We know  
12 how important it is to reward authors for their creations,  
13 because who would sit down and write a good book or compose a  
14 beautiful song or write a great API if somebody could just rip  
15 it off?

16 And so we know that this is about the Structure,  
17 Sequence and Organization in Java 2 Standard Edition, which may  
18 not be a symphony, but we heard from the witnesses it's kind of  
19 like creating a symphony or other kind of creative work.

20 We know that Google decided to copy the Application  
21 Programming Interfaces leading to the copy of the Structure,  
22 Sequence and Organization for a commercial reason. It wasn't a  
23 requirement of anything. They wanted to get Android quickly on  
24 the market.

25 We know that there are also a dozen files that are

1 copied word-for-word, line-for-line all the way through because  
2 the clean room was not clean. The clean room was very dirty.

3 And Google concedes all this copying. They -- Google  
4 has to concede this copying because either it jumps out when  
5 you look at it or because it was part of their plan. It was  
6 their plan to change the business model, even though Sun, later  
7 Oracle, disagreed.

8 We know that the copying is in Android. 750,000  
9 activations a day, a staggering number. At bottom, another way  
10 to express what this dispute is about, Oracle's Application  
11 Programming Interfaces as represented by the Structure,  
12 Sequence and Organization of the Android code gets turned on  
13 750,000 times a day without any acknowledgment by Google that  
14 that is Oracle's property without ever taking a license.

15 And that's the next thing we know a lot more about.  
16 We know a lot more about the permission that Google should have  
17 gotten from Sun, now Oracle, to do what they are doing, because  
18 as I said, you now know a ton more about licensing and about  
19 the various forms of licenses and about the requirements of the  
20 Sun, now Oracle, licenses designed to protect compatibility and  
21 "write once, run anywhere."

22 I promised you in my opening that we would prove that  
23 from top to bottom, beginning to end, Google executives knew  
24 what they were doing. They knew that they needed a license.  
25 They knew they didn't have a license. They knew this day would

1 come because they predicted lawsuits. And the evidence at  
2 trial showed that.

3           When you go back to the jury room and sift through  
4 all the emails -- this new world that we live in in which  
5 people don't talk, they write each other emails so we know  
6 exactly what they are saying to each other -- you will see  
7 email after email in which the Google executives knew this day  
8 would come.

9           So what this trial was mostly about was Google's  
10 excuses. They took the property. They acknowledge they took  
11 the property. Do they get off? Is it a, quote, fair use,  
12 which we'll spend a fair amount of time explaining and  
13 understanding.

14           Part of the theme of Google's presentation was Sun,  
15 later Oracle, didn't sue everyone. So why are they suing us?  
16 It's kind of like, "My sister gets away with it, why are you  
17 blaming me?" But you don't have to sue everybody in order to  
18 enforce your rights against the party that is taking commercial  
19 advantage of your intellectual property, and it was  
20 acknowledged that that was Google's unique role in this  
21 business.

22           And then it comes down to a blog post. Jonathan  
23 Schwartz posted on his blog how excited he was about the launch  
24 of Android. A blog post is not permission. A blog post is not  
25 a license.

1           The judge has been very clear about what this case is  
2 about. It's about the law. It's about the instructions and  
3 about the jury, your role applying the facts, the evidence to  
4 the law.

5           And so what we're going to do in the next 60 minutes  
6 or so is walk through the form of the verdict that you're going  
7 to see and some of the instructions that Judge Alsup will read  
8 to you at the end of this part of the trial and explain how the  
9 evidence that you've seen fits into those instructions and what  
10 we're asking you to do on the verdict form.

11           So we started with the fact that this case is a  
12 copyright case, and you saw the registrations. You saw some  
13 testimony toward the end of the trial about what was sent to  
14 the Copyright Office. When you go back and deliberate and you  
15 look at Exhibits 450 through 455, and 460 through 464 and all  
16 these exhibits that are on this screen, you will see that Sun  
17 registered its copyrights for version after version, release  
18 after release, because copyrights were critical to its  
19 business. They are an important kind of property, an important  
20 kind of intellectual property.

21           You may have wondered what the testimony was about,  
22 about what was sent to the Copyright Office and what was going  
23 on there. When you look at the instructions, you will see that  
24 there is no issue about the registrations covering the software  
25 that was copied. You will see that there is no issue about any

1 ownership in the case. There is no question that Oracle owns  
2 the property that we are suing on and there is no question that  
3 the registrations cover that property.

4 The first question you're going to get asked on the  
5 verdict form is:

6 "As to the compilable code" -- which the  
7 judge will explain to you -- "for the 37 Java  
8 API packages in question taken as a group,  
9 has Oracle proven that Google has infringed  
10 the overall structure, sequence and  
11 organization of the code?"

12 Now, let's go back a little bit and understand where  
13 this question is coming from.

14 And, Mr. Lee, if you could give us Instruction 17,  
15 the line that begins "I instruct."

16 (Document displayed)

17 So you will hear from Judge Alsup and you will see  
18 instructions that instruct you on this question you may have  
19 sensed was lurking through the trial, which is: What is  
20 protectable in the Java software. And you will be instructed  
21 that the copyrights in question cover the Structure, Sequence  
22 and Organization of the code. And you'll hear that the  
23 compilable code is the code less the English language comments.  
24 It's the code in programmer's language that gets run through  
25 the compiler and turns into the bits and bytes that actually



1 run the computer.

2 And you will also hear and see in the instructions --

3 Mr. Lee, can I have Instruction 19, please, with

4 "Google agrees." Go down to the next "Google agrees."

5 (Document displayed)

6 That:

7 "Google agrees that the Structure, Sequence

8 and Organization of the 37 accused API

9 packages in Android is substantially the same

10 as the Structure, Sequence and Organization

11 of the corresponding 37 API packages in

12 Java."

13 So we have the bookends here. We have the

14 instruction that Structure, Sequence and Organization is that

15 stuff in the software that is at issue and is protectable by

16 copyright, and we have Google's agreement that the Structure,

17 Sequence and Organization was taken and is substantially

18 similar.

19 But you heard all that through the trial because this

20 is the big excuse that Google has to offer you. They had to

21 explain first that they did take it and then try to get off the

22 hook.

23 So when we actually went through the evidence at

24 trial, you heard first Judge Alsup read an admission from

25 Google that the 37 accused packages have substantially the same

1 selection, arrangement and structure. And then you heard  
2 Google's expert say, "Not just substantially the same, but that  
3 the Structure, Sequence and Organization of the API elements is  
4 virtually identical across those 37 packages."

5 And, Mr. Lee, can I have the instruction on names,  
6 which is Paragraph 20 of the instructions?

7 (Document displayed)

8 And the last sentence:

9 "While individual names are not protectable  
10 on a stand-alone basis, names must  
11 necessarily be used as part of the Structure,  
12 Sequence and Organization and are to that  
13 extent protectable by copyright."

14 Now, you may remember Google's opening statement in  
15 which Google's counsel stood about here and said, "Names are  
16 not protectable." Here is the instruction. An individual name  
17 is not protectable, but the names as part of the Structure,  
18 Sequence and Organization are protectable by copyright.

19 And you saw when you saw the various exhibits how the  
20 names were the same and then you heard admissions on this point  
21 in this case on this slide by Mr. Bornstein, who said the names  
22 and the declarations are the same. So Structure, Sequence and  
23 Organization is the same. The names are the same.

24 And then we had an even more detailed admission from  
25 Dr. Astrachan, Google's expert who was asked:

1           **"QUESTION:** Are there similarities between  
2           the two?"

3           And he started off by saying no and then he had to  
4 admit all the similarities:

5           **"ANSWER:** The Package names, the Class names,  
6           the Method names for the 37 packages are the  
7           same."

8           And then he said:

9           **"ANSWER:** Of course, the structure of the  
10          names of the classes, packages and methods  
11          needs to be the same."

12          Now, Google's argument is that this implementing code  
13 is different, but what Judge Alsup will instruct you is that  
14 the Structure, Sequence and Organization is protectable and  
15 what Google is acknowledging is whether it's just the structure  
16 on its own, or the structure with its names. All of that is  
17 protectable and all of that Google took.

18          And you actually saw source code in this trial that  
19 showed what this means. What does it mean when you compare the  
20 code to the code for the Structure, Sequence and Organization  
21 to be the same? So, in this package called java.security you  
22 can see the names are identical between Java and Android. They  
23 are in the exact same structural position in the code. The  
24 Structure, Sequence and Organization is quite visible. If you  
25 look at these declarations, these method signatures, these

1 method names, they are identical because that's what Google  
2 intended to do; was to copy the Application Programming  
3 Interfaces and, hence, create an identical Structure, Sequence  
4 and Organization.

5 And this copying was not trivial. Google will try to  
6 minimize the extent of it. They will try to minimize it in  
7 several ways. In the trial you heard about 15 million lines of  
8 code for all of Android.

9 Judge Alsup will instruct you that we've got to focus  
10 very clearly on what we're comparing. We're not comparing  
11 against the 15 million lines. You'll get an instruction that  
12 says, along the lines of you don't escape infringement by  
13 adding. You look at what was taken and you look at what was  
14 taken against the body of material, the work as a whole from  
15 which that material was taken.

16 And so this copying was extensive; 400 classes, 4,500  
17 methods, 7,000 declarations. And it printed out what amounts  
18 to 11,000 pages of Application Programming Interface  
19 specifications. 11,000 pages representing the property that  
20 was taken by Google.

21 Now, we saw a lot about Math.max, and in some ways it  
22 was helpful. I think we all learned a lot from Math.max, but  
23 let's not get confused about Math.max. It is not a  
24 representative Application Programming Interface specification.  
25 You may recall that it doesn't even show up on our Java

1 Application Programming Interface poster because it's down too  
2 fine a detail to actually appear on the poster.

3 (Demonstrative displayed)

4 Now, what we have done with this version of the  
5 poster that's before you -- so the poster is Trial Exhibit  
6 1028. What we have illustrated on this slide is the 37  
7 packages and how they exactly overlap with the poster. The  
8 yellow starred packages are in the 37. You'll see that some  
9 aren't yellow starred. And then on the right we created the  
10 four -- we listed the four packages that aren't on the poster,  
11 but are in the 37.

12 So you can get a sense of the extensiveness and the  
13 importance of what Google took by looking at this poster and  
14 how many of the packages that made it onto the poster years  
15 ago, well before this litigation, have this star.

16 It's a very complex structure. Blueprints don't do  
17 it justice. It's more like a very detailed wiring diagram or  
18 plumbing outline because we're talking about all these  
19 connection points, all these interrelationships.

20 And so you heard about java.io or java.nio and  
21 java.util and you saw how complicated these packages are when  
22 you drill down. And, in particular, java.nio that Dr. Reinhold  
23 spent two years with his colleagues working on, it has levels  
24 under levels under levels. .max is trivial. Application  
25 Programming Interfaces are complex, creative, artful.

1 And then if we're going to hear arguments from Google  
2 about how this copying is not substantial, we asked  
3 Dr. Astrachan:

4 "QUESTION: These 7,000 lines that represent  
5 the declarations that are copied  
6 word-for-word, symbol-for-symbol, what  
7 happened if you took them out?"

8 Well, if you took them out, Android would not work as  
9 it's designed. He said:

10 "ANSWER: They need to be there for Android  
11 to work as it's been designed."

12 So this is not trivial. This is very substantial  
13 copying that Google engaged in, very substantial copying that  
14 we're asking you to hold them liable for.

15 And so on the verdict form:

16 "As to the compilable code for the 37 API  
17 packages in question taken as a group, has  
18 Oracle proven that Google has infringed the  
19 overall structure?"

20 It's essentially conceded, and it's important, and  
21 it's substantial, and so we're going to ask you to vote and  
22 decide on the verdict form "Yes."

23 So we're onto Google's excuses. And the first excuse  
24 is called fair use. And there's is a question on the verdict  
25 form, as you can see, that speaks to what fair use -- speaks to

1 the fair use question.

2 And you're going to get a very lengthy instruction on  
3 what fair use is. And I'm going to try to break it down a  
4 little bit into its parts and walk you through the evidence  
5 that applies to each of those parts.

6 Fair use is a concept in copyright law that's very  
7 important. Not everybody licenses their material for all sorts  
8 of purposes. And so the law allows people to make what's  
9 called fair use, which is not the same as making uses that we  
10 might think are fair, but a very -- very concrete concept, fair  
11 use.

12 The law allows us to use other people's copyrighted  
13 materials for fair use. And the instruction that you'll see  
14 begins by giving some examples of what fair use in copyright  
15 law can be.

16 So, for example, if I'm writing a criticism of a film  
17 and I think there was a particularly elegant turn phrase in the  
18 film script, I might be able to write in my criticism, in my  
19 film review that line and say, "Wow, that was great." Because  
20 it's a film review and a film review, it's a film review. It  
21 doesn't take away from the market for the film. It might  
22 criticize the film, but it doesn't take away from the film  
23 maker's right to show the movie, put it in theaters, put it on  
24 TV, et cetera.

25 The same is true for comment, news reporting,

1 teaching and scholarship. There is room in the law for us to  
2 use these materials as we've used them in this Court. We have  
3 reproduced things on boards to teach the jury about the  
4 Application Programming Interfaces in question. And, of  
5 course, that's fair use. That doesn't harm Oracle's business  
6 to do that, to make that kind of use of it. And similarly for  
7 research.

8           So these are the examples that the statute gives to  
9 try and give us a sense of what the drafters of the Copyright  
10 Act meant when they said fair use is permissible.

11           Now, of course, none of these are what Google did.  
12 Google did not engage in criticism of Java. That's not the  
13 issue here. It didn't engage in comment, news reporting,  
14 teaching, scholarship or research. What Google did is take the  
15 APIs, the Structure, Sequence and Organization from our code  
16 and put it in their code. None of the examples fit what Google  
17 did. And of equal importance, what Google did doesn't even fit  
18 within the spirit of those examples.

19           Now, the instruction that you'll see on fair use  
20 breaks down -- after it goes through the examples, it says here  
21 are four facts for you to apply. And the instruction will give  
22 you some guidance when you're applying the factor on whether  
23 it's in Oracle's favor or Google's favor.

24           And so the first instruction is -- the first factor  
25 is the: "Purpose and character of the use." What kind of use



1 did Google make of the Structure, Sequence and Organization of  
2 Java? Is it of a commercial nature, or is it for non-profit  
3 educational purposes? Well, you can see from the examples  
4 which way this factor cuts because many of the examples were  
5 non-profit educational purpose kind of examples. So had Google  
6 actually done Android for charitable purposes because it was  
7 good for humanity, then that might favor Google on the fair use  
8 analysis.

9 But, of course, that isn't why Google made Android.  
10 Google made Android. Google used the Java APIs to make money.  
11 That's fine in and of itself, but it doesn't amount to an  
12 excuse for the copying. It was a commercial purpose and  
13 commercial use cuts against Google on fair use, cuts in favor  
14 of Oracle on denying Google this excuse, denying Google this  
15 out.

16 And, of course, you heard this from several witnesses  
17 on the Google side. From Eric Schmidt. He said:

18 "The primary reason to have something like  
19 Android is that people will do more searches,  
20 and then we'll get more money as a result."

21 Well, again, this case is about business, so we're  
22 not criticizing Google for trying to make money. But they  
23 don't get an out from infringement when their purpose was  
24 commercial. They don't get off the hook.

25 And then, of course, it's not a little bit of money

1 that Android is making. It's not money on the side. Public  
2 benefit is the primary reason for Android. That's not the  
3 situation. Because you heard from other witnesses -- again,  
4 Eric Schmidt, or a witness you heard a very brief deposition  
5 clip, Mr. Agarwal -- Android is hugely profitable.

6 So on the first factor, so far we have talked about  
7 commercial non-profit. It's not -- it's not non-profit. It's  
8 commercial and, therefore, the factor cuts against Google.

9 Now, there is another element in the factor that's a  
10 little tricky. It's a little hard to penetrate. The question  
11 is: Whether the work is transformative, meaning whether  
12 Google's use added something new with a different purpose or  
13 different character, altering the copied work with new  
14 expression, meaning or message.

15 I expect you will hear a lot about transformative  
16 from Google's counsel in his closing because that word has a  
17 lot of potential meanings. We have to go back to those  
18 examples to understand what transformative is really all about.

19 If you're writing a criticism of a film, it's  
20 transformative. You've taken a film. You've taken a little  
21 bit of the film. You've put it in a review that's going in a  
22 newspaper. That's transformative.

23 What Google did is not transformative. What Google  
24 did was just take the 37 APIs that it wanted, took them out of  
25 the Java code and put them in the Android code. The Java

1 Platform was copied for the Android Platform. The Java  
2 software was copied into the Android software. It's a direct  
3 taking from software into software, platform into platform, API  
4 into API for exactly the business purpose that we can't allow  
5 transformative to excuse.

6 Why did they take the APIs? They took the APIs  
7 because Java developers, trained by Sun, educated by the Java  
8 Java Community, part of the Java Community process, those  
9 developers understood and knew those APIs and Google wanted to  
10 leverage those APIs. You heard that from witness after  
11 witness. That can't be transformative. That's just copying,  
12 copying for a business purpose.

13 So when you think about transformative, think really  
14 hard about what that language is in the instruction and what  
15 Google did.

16 Now, there was another little piece of  
17 transformative. You heard Google say over and over again in  
18 argument, "Why is what we did so magical in Android?" Google  
19 said, "We were the first smart phone platform. We took Android  
20 and we put it in smart phones." My Blackberry is a Java  
21 Blackberry and it's a smart phone. And witness after witness  
22 told you that Java was powering the Nokia or other Blackberry  
23 devices.

24 And, of course, Danger, the company that Andy Rubin  
25 started this mobile business was, was a smart phone platform

1 licensed to Java APIs. So on the record in this trial what's  
2 the first smart phone platform? It's a Java license  
3 smart phone platform created by Danger with permission, with  
4 agreement, with compatibility, with compensation then to Sun.

5 So is Android kind of cool and is it the hot new  
6 thing? Of course it is. But is it transformative within the  
7 meaning of the law? All they did was copy Java APIs, which had  
8 been used in smart phones, into Android APIs used in smart  
9 phones. That was all Factor 1 in the four factors of the fair  
10 use analysis.

11 Let's turn to Factor 2. Factor 2 is: The nature of  
12 the copyrighted work, including whether the work is creative,  
13 which cuts against Google, cuts against fair use; functional,  
14 which supports fair use; or factual, which also supports fair  
15 use.

16 You can understand, especially the factual part. If  
17 I'm -- I will fantasize. If I'm John Stewart and I'm putting  
18 together the *Daily Show* and I want to do a little news clip of  
19 something factual that happened during the day, that might well  
20 be fair use. Especially because I'm creating comedy out of it  
21 and so I am transforming it from what it was into something  
22 different.

23 Creative, on the other hand, cuts against fair use  
24 because if you take a lot of a poem, even only a 10 line poem  
25 and you publish it, you've taken the whole poem and it's a very

1 creative poem, even though it's only 10 lines.

2           Now, this is a little -- this one is a little tricky  
3 to apply here because, obviously, we're talking about computer  
4 programs and computer programs in some sense are functional.  
5 But we're talking about the Structure, Sequence and  
6 Organization of the Application Programming Interfaces. And  
7 you heard witness after witness from both companies talk about  
8 how creative API design is. How much freedom there is for the  
9 architects of Application Program Interfaces to create  
10 something new and different, to create something expressive, to  
11 create something that is not just pedestrian and not just  
12 functional.

13           And so you heard from Larry Ellison about how it's  
14 the most experienced and talented software engineers. You  
15 heard from Mark Reinhold how it took a keep of engineers just  
16 to develop java.nio, it took them two years. You heard from  
17 Eric Screven that it's a very creative process, especially  
18 compared to other programming tasks. It's the most creative.  
19 You heard from Dr. Reinhold again about how, except for  
20 something trivial like Math.max, there are an infinite number  
21 of choices. You can't even count them.

22           And then even from Google's expert you heard that  
23 it's hard to find people who are really good at anything hard,  
24 and APIs are hard, and it's hard in the way that being an  
25 artist or a football player or a concert violinist is hard.

1           And then, of course, there was Josh Bloch, who I  
2 think we all found somewhat entertaining as a witness, but who  
3 was very clear; that API design is a highly creative activity,  
4 and it's even an aesthetic matter. It's magical. It's like  
5 painting.

6           And so Google's own witnesses reinforced that on this  
7 creative to functional to factual scale, we're over on the  
8 creative side. Maybe slightly in between, because computer  
9 programs have a functional aspect to them. But the Structure,  
10 Sequence and Organization is a highly creative activity.

11           On fair use Factor 3 -- so we've got two more to  
12 go -- the amount and substantiality of the portion used in  
13 relation to the copyrighted work as a whole. The more that's  
14 taken, the less it's likely to be fair use.

15           Go back to my John Stewart example. If he takes just  
16 take a five second clip, it's more likely to be fair use than  
17 if he takes a full 45 seconds of a news broadcast.

18           What did Google take here? I mentioned earlier that  
19 you will get an instruction on the work -- on this question  
20 lurking in this factor of what the work as a whole is. What  
21 are we comparing when we look at how much was taken out of Java  
22 to decide this fair use factor? And what you'll hear in the  
23 instruction is that we are to compare the 37 packages that were  
24 taken with the 166 API packages that are in Java SE Version 5,  
25 which is the specific version at issue. And so 37 packages out

1 of 166.

2 I think you can see already, we're talking about a  
3 lot. If we had five or six chapter book, you're talking about  
4 a whole chapter. But we know that what was taken is highly,  
5 highly important and not trivial and not small; very  
6 substantial and very important qualitatively.

7 Because, of course, these weren't randomly selected  
8 packages. We heard that there is particular importance to  
9 these packages because they are the ones that are especially  
10 well known to Java developers. These are the ones that are  
11 popular. These are the songs that everybody recognizes.

12 And so Google's argument is going to be, Well, that  
13 excuses our copying because what we did is we wanted to get the  
14 APIs that were in people's heads so they wouldn't have to be  
15 retrained. That may have been their commercial objective, but  
16 from the fair use standard that's precisely why what they did  
17 was not fair use. They took the popular ones. They took the  
18 valuable ones. They took the crown jewels of the packages in  
19 Java Standard Edition, the 37 that they thought were the most  
20 valuable.

21 And you heard this from both experts. So  
22 Dr. Mitchell told you that the 37 packages are highly useful.  
23 Dr. Astrachan said this was how Android was designed, was  
24 around these 37 packages. So if you ripped out the code, the  
25 declarations, Android would not work as designed.

1 And then the actual developers explained how they  
2 chose the 37 packages. So Dan Bornstein said:

3 **"QUESTION:** Did your determination of which  
4 packages would be implemented in the core  
5 library have anything to do with what you  
6 thought were the expectations of Java  
7 language programmers?

8 **"ANSWER:** Yes, absolutely."

9 And there are certain of these APIs, he said, which  
10 are just sort of fundamentally part of the system. The core of  
11 the core, in essence, is what he was saying. And his job, he  
12 said, was to come up with a nice consistent set of APIs.

13 And then Bob Lee said.

14 "This is the good stuff from Java that the  
15 Android developers took."

16 **THE COURT:** Mr. Jacobs, you're coming up on about 40  
17 minutes so far.

18 **MR. JACOBS:** Factor 4 is: The effect of the use upon  
19 the potential market for or value of the copyrighted work. And  
20 if you impair the value of the copyrighted work, that cuts  
21 against fair use.

22 So the question to ask yourself on Factor 4 is: What  
23 is Android's use due to Java? And this in some ways was the  
24 heart of the trial. Because you heard lots of evidence about  
25 how Java is licensed to many, many companies who follow the



1 rules, participate in the Java Community process, contribute to  
2 Java's development, pay license fees where appropriate.

3 And you heard about a case from Oracle's witnesses  
4 where Android is now invading into Java's old space, such as  
5 the Kindle. And you heard that the Kindle Fire is now an  
6 Android device, even though the Kindle Kindle was a Java  
7 device.

8 So we have head-to-head competition where Android is  
9 taking over customers, licensees, from Java. And the harm is  
10 very concrete. We have a Java licensing businesses. It has  
11 its structure. You've heard a lot about commercial licenses,  
12 and spec licenses and a GPL. And if Android can just take the  
13 APIs, if Google can just take the APIs and be forgiven under  
14 fair use, that licensing falls apart. Why would I sign a  
15 license if I can take for free, and take without any kind of  
16 restriction or control to ensure compatibility?

17 And that, of course, is the deep threat that Android  
18 represents to the whole Java Community, because you now know a  
19 lot about "write once, run anywhere" and how important it is to  
20 keep Java consistent. So when Java ME is on this phone and  
21 another company's Java ME is on that phone, the applications  
22 will work. And the same with Java SE to SE or Java Card to  
23 Java Card.

24 That is the consistency that Sun, now Oracle, have  
25 struggled with. It's a huge challenge to keep everybody moving

1 in the same direction. But there is a process and a set of  
2 rules and that's what Google is breaking.

3 You heard some testimony from Google witnesses that  
4 this was all about compatibility. Listen to what they said  
5 before the lawsuit. Here is their frequently asked questions  
6 about compatibility when Android was launched.

7 "QUESTION: Does Android support existing  
8 Java apps?

9 "ANSWER: No.

10 "QUESTION: Is Android Java compatible?

11 "ANSWER: No."

12 And so Android has fragmented the developer  
13 community. And what was a world before in which everybody was  
14 speaking the standard version of Java, we now have a  
15 non-standard version, Android Java. Keeping the developers  
16 together and knowing the same language is part of the struggle  
17 of maintaining this Java Community. Android is a direct threat  
18 because of its fragmentation.

19 Now, what's so interesting about this particular form  
20 of harm to Java and the particular threat that Android poses is  
21 that this, too, was known from top to bottom at Google.

22 So on October 11th in Trial Exhibit 7 Andy Rubin said  
23 to Larry Page, "In the original version of Android let's avoid  
24 fragmentation. We don't want to create fragmentation, so we're  
25 going to pay Sun for the license and for the Technology

1 Compatibility Kit."

2 On October 26, Trial Exhibit 125, Tim Lindholm tells  
3 Andy Rubin, "Let's make sure we're showing strong efforts at  
4 avoiding fragmentation so we don't have trouble with Sun."

5 All the way through, November 14, 2007, Rubin on  
6 fragmentation responding to a press article. "This is touchy,  
7 because we're not compatible."

8 And then there is this whole claim by Google that  
9 they have advanced Android into the kind of advanced  
10 smart phone platforms and that Sun and Oracle never made a full  
11 smart phone platform. And you heard some very concrete and  
12 direct testimony on why that is so.

13 "Android has foreclosed the market, has blocked the  
14 opportunity for Java to move into smart phones." And you heard  
15 that from Ed Screven.

16 And then in very simple terms from Safra Catz:

17 "It's really hard to compete with free.

18 Android took the Java IP. Google takes the  
19 Java IP, puts it into Android and gives it  
20 away for free. How do you compete with free  
21 in the smart phone world?"

22 And so this, this harm to Java is on all levels.  
23 It's on the licensing model, it's on fragmentation, and it's on  
24 opportunities for the future.

25 So this cuts against fair use under Factor 4. And so

1 if you go through each of the factors and look at them against  
2 the evidence at this trial, we think you'll conclude that  
3 Google's use is not fair use. It's not any of those  
4 categories, teaching, scholarship, et cetera. It's a  
5 commercial use. It's not transformative. It's just software  
6 to software. These are creative works. What they took is  
7 really important and valuable, as well as large in quantity.  
8 And then there's a direct harm to Java from what Google did.

9 And so we ask that when you get to the fair use  
10 question, "Has Google proven ..." -- because you'll be  
11 instructed on this issue, Google bears the burden of proof;  
12 they have to persuade you that what they did was fair -- we ask  
13 that you check the "No" box.

14 That brings us to question 2 on the verdict form.  
15 And that is the question of the documentation.

16 And you heard from the developer of the documentation  
17 what he did. He acknowledged that the Java developers were  
18 looking -- sorry, the Android developers were looking at the  
19 Java documentation when they were writing the Android manuals,  
20 the Android documentation.

21 And so we asked him, well, how did you prevent them  
22 from copying? He said, well, I told them to paraphrase.

23 Well, what is paraphrasing? Here we know what  
24 paraphrasing is because we gave you examples of paraphrasing.  
25 Paraphrasing is you substitute in one word here and there to

1 try and make it look a little bit different.

2           What we've done with this text is highlight in yellow  
3 the words that are identical, and in -- and in a red box  
4 highlighted the words in the sentences that are different. And  
5 you can see that word for word it's very, very similar.

6           Now, the instruction you are going to get on  
7 documentation is going to be different from the compilable  
8 code.

9           Compilable code, structure, sequence and organization  
10 is protectable. They agree they copied the structure,  
11 sequence, and organization. It's kind of a lay down.

12           On the documentation you are going to be told that  
13 the standard is virtual identity. So you're going to have to  
14 think about this example, and you're going to have to decide  
15 for yourself, does this look virtually identical?

16           We submit that when you look at that example or you  
17 look at this example from class CipherInputStream, you will  
18 conclude that it is virtually identical.

19           And then you're going to get the fair use question,  
20 again, on the documentation. And we think you will go through  
21 the same factors for the same analysis and the same reasoning.  
22 But there was one little bit of testimony -- two little bits of  
23 testimony I want to highlight for you.

24           So, first of all, were we just talking about these  
25 examples in this trial, Google is going to argue all they

1 showed you was one or two examples.

2 And, in fact, what Mr. Lee acknowledged was that when  
3 we showed those examples to him in the trial, they were  
4 representative. He said he would expect to see the same level  
5 of similarity across the documentation for the 37 packages.

6 And it's an immense quantity here. We're talking  
7 about thousands and thousands of pages.

8 But then he said something very interesting. He  
9 said: You know, actually, I wasn't even a big fan of including  
10 these. Referring to the Java APIs. I would have preferred we  
11 just point people to Sun's site for this specific  
12 documentation, because you shouldn't really be rewriting a  
13 contract. Recall that their analogy for the APIs is it's like  
14 a contract. And in doing so, they are going to be  
15 substantially similar.

16 So he even felt uncomfortable creating the Android  
17 documentation, and thought that the way to have handled this  
18 was to send people to the Java documentation, the Sun  
19 documentation.

20 So in thinking about whether did Google really do  
21 anything to the Java documentation, copying it into Android,  
22 that is in some way beneficial? We submit, no, because even  
23 Mr. Lee said you could go to the Sun site.

24 And so has Google proven that its use of Java  
25 documentation constituted fair use? No.

1           This brings us to the copied code files. And, again,  
2 Google has conceded that the use of these files -- that they  
3 used these files and that they copied them.

4           And it's not exactly clear what the defense is going  
5 to be. This is the list of files in 1072. They fall into a  
6 couple of different categories. You may recall the most  
7 interesting category was this decompilation. Why was it  
8 interesting? Because, as you heard in the trial, you don't  
9 decompile by accident.

10           Josh Bloch, you know, he wasn't sure how rangeCheck  
11 got in there. But nobody came before you and told you, oh, I  
12 decompiled by accident.

13           You don't decompile by accident. It's an overt,  
14 deliberate act for copying.

15           And there are eight files that are copied as a whole.  
16 And you'll hear from Judge Alsup that you compare here the  
17 amount that was taken is against the file. The file was taken  
18 as a whole here. And, therefore, the copying is infringement.

19           There were the examples of comments. When you look  
20 at the instruction, you'll see that what you need to decide  
21 here is whether if you looked at the copying you would  
22 recognize that it was copied.

23           And if you look at this slide, which shows the copied  
24 comments, you can see it's not so fragmentary and isolated that  
25 you don't realize what's going on. There's plain copying of

1 comments.

2 And while in this case it is actually small in  
3 relationship to the whole file size, the copying still jumps  
4 out.

5 Then there was rangeCheck, which is only nine lines  
6 of code. And you'll hear that a lot.

7 But you also heard testimony about how important that  
8 rangeCheck is, and how, from Dr. Mitchell, he concluded that  
9 rangeCheck is called 2600 times just in powering on the device  
10 or starting the emulator. So it's important nine lines of  
11 code.

12 So the question is a little -- you have to parse it a  
13 little carefully here.

14 Has Oracle proven that Google's conceded use of the  
15 following was infringing? The only issue being whether such  
16 use was de minimus. Meaning really, really tiny so you don't  
17 recognize it.

18 And the answer in all cases should be "Yes" because  
19 even laypeople like us, when we see the copying we can  
20 recognize the copying. It is not so isolated and fragmentary.

21 And, extraordinarily, these files are still on the  
22 public website. These copied files, these decompiled files.

23 And that's what Dan Bornstein told you in his  
24 testimony. It took several questions, including, finally, a  
25 question from the Court. Yes, these files are still available



1 to the public.

2           So there's some other -- there's some other issues in  
3 the trial that are kind of off to the side. You won't see them  
4 directly reflected in the instructions, but I want to go  
5 through them briefly, just to summarize the trial testimony.

6           There was a lot of back and forth on these issues,  
7 and so let's just take a moment. Are the APIs part of the  
8 language? The language Oracle has acknowledged. The language  
9 is free for everybody to use, so can use the APIs freely.

10           Experts agreed that except for a small number of  
11 classes, the APIs are not required by the language. And you  
12 heard this from Dr. Astrachan, who said it is not a requirement  
13 of the Java programming language to take the 37 packages.

14           You heard a lot about the brand issue. What is  
15 the -- Jonathan Schwartz testified, well, you only need a  
16 license if you're using the brand.

17           And then I confronted him with the specification  
18 license. And, you may recall, I was shocked when he said, no,  
19 I don't know the license. And he said, oh, I wasn't giving you  
20 legal advice. I wasn't talking about legal issues; I was just  
21 talking about the business strategy. After spending all this  
22 time in his direct examination saying, Under our licensing  
23 scheme, you only need to take a license if you use the Java  
24 brand.

25           And then he ran away from it. Well, he had to

1 because the specification license, which you heard explained  
2 line-by-line detail, by Thomas Kurian, applies even if you  
3 don't use the brand, even if you don't call what you did Java.

4 And, of course, Google knew that the APIs were  
5 copyrighted and required a license. This is Trial Exhibit 18.

6 If you have any doubt on the -- how the trademark  
7 relates to the APIs and what's copyrighted, take a look at  
8 Trial Exhibit 18. Andy Rubin explains exactly what we've been  
9 explaining to you in this trial.

10 "The APIs are copyrighted and Sun gets to say  
11 who they license to."

12 The Google developers tried to claim that Android was  
13 developed in a clean room. But you know the clean room is  
14 dirty. There's copied code. There's decompiled code.

15 You heard that the contractors that they used at  
16 Noser were super shady.

17 And then you heard a clean admission that Josh Bloch  
18 had prior Java knowledge, but was put on the Android team; and,  
19 of course, he copied rangeCheck.

20 There's a lot of back and forth about whether this  
21 negotiations between Sun and Google were really about a  
22 partnership instead of a license.

23 It was a sideshow because, of course, even if there  
24 had been a partnership, there would have been a license. And  
25 if there wasn't a partnership, there would have been a license.

1           So partnership license doesn't really matter. You  
2 can look at Trial Exhibit 12, from Andy Rubin to Tim Lindholm.  
3 Here are our choices: We'll partner or we'll take a license.

4           There was no partnership. They didn't take a  
5 license. That's why we're here.

6           Now, the judge has asked you for some help. The  
7 question on the verdict form you will get is slightly different  
8 from the poster, but the substance is the same.

9           He's asked you for some help on the whole issue  
10 around Jonathan Schwartz's blog, and whether what Oracle did  
11 gives Google an excuse because Sun said certain things, Oracle  
12 said certain things.

13           And the question is divided into two parts. It's,  
14 first, whether Google proved that Sun or Oracle did something  
15 that Sun or Oracle should have known would lead Google to think  
16 that Android was okay.

17           And then the second part is whether Google proved  
18 that it reasonably relied on what -- on what -- on Sun or  
19 Oracle's conduct.

20           So let's break that down a little bit and go through  
21 the evidence.

22           Did Sun do anything to lead Google to think Android  
23 would be off the hook?

24           And we start with the very basics. The copyright  
25 notice is on the documentation. And the license agreement is a

1 click-through. So copyright, now Oracle or its affiliates all  
2 rights reserved, use is subject to license terms.

3 And the developers of Android acknowledged that they  
4 consulted the Java specifications on Sun's website and they saw  
5 the copyright notice. And, of course, we have Andy Rubin  
6 acknowledging that the APIs are copyrighted.

7 And then there was this whole Apache Harmony fight.  
8 Now, remember that Android takes some of the core library code  
9 from Apache Harmony.

10 So their pitch to you is, because Sun didn't sue  
11 Apache Harmony, Sun engaged in conduct that would lead Google  
12 to believe that it didn't need a license to the structure,  
13 sequence and organization of the code.

14 But you heard witness after witness, saw exhibit  
15 after exhibit on this issue, too. This was a huge dispute.

16 There was nothing quiet about the fact that Sun and  
17 Apache were in a big disagreement over Harmony. And, in fact,  
18 on April 10th, the Apache Software Foundation writes a letter  
19 to Sun and says, We don't like your approach here. We think  
20 you should give us this all for free without any restrictions.

21 And, of course, there was acknowledgment by witness  
22 after witness that there never was a license granted to Apache  
23 for Apache Harmony.

24 Which brings us to the blog post, which, you'll  
25 recall, there was a lot of testimony about exactly when the

1 blog post comes, what Jonathan Schwartz knew when he made his  
2 "rockets on Java" exclamation.

3 But it's very simple. These are big companies,  
4 sophisticated companies that engage in licensing all the time.  
5 Their business is intellectual property and software.

6 A blog post is not a license. If Google thought the  
7 blog post was permission, why wouldn't they have gone to Sun  
8 and nailed it down and said, you seem to be very happy, after  
9 all, with Android. Let's document it in a written agreement  
10 that we sign.

11 The blog post you heard from Mr. McNealy, Jonathan  
12 Schwartz's boss, was not an official statement of Son's  
13 position. And Google knows better than to claim that a blog  
14 post is official permission.

15 Now, besides the public statement, there was a lot of  
16 back and forth between Sun and Google throughout this period.

17 And we know that the private communications were much  
18 less positive about Android than what was said publicly. And  
19 we know that, in part, because of what Jonathan Schwartz  
20 admitted about how he felt about the situation.

21 He felt he didn't have a lot of leverage. He felt  
22 that he didn't have a lot of strength in the situation. And so  
23 he said, We grit our teeth and we made the best of an  
24 uncomfortable situation.

25 And you know that Sun was in a weakened position

1 around this time, and you know that there were questions about  
2 its viability and the viability of Java. And so Jonathan  
3 Schwartz was trying to make the best of a bad situation.

4 And one week after the blog post, an executive vice  
5 president of Sun publishes a statement that also circulates  
6 within Google and says, "We're really interested in working  
7 with Google to make sure we don't end up in a fractured  
8 environment." This is exhibit 1048.

9 And so while we have the blog post before the  
10 announcement saying "rockets on Java," then the announcement  
11 and the SDK is actually released and Sun expresses official  
12 concern. Official concern.

13 And then there's exhibit after exhibit of back and  
14 forth between the companies in 2008, 2009, 2010. This is 2070.

15 There was Mr. Cizek's testimony about how he went to  
16 Google in 2009 and said, You guys need to be licensed.

17 There was Jonathan's Schwartz warning Larry Ellison  
18 on the eve -- on the wake of the transaction closing, "I need  
19 to talk to you about our battles with Google Android." So  
20 publicly he was trying to make the best of a bad situation.

21 Privately, the situation remained unresolved, and he  
22 was warning Oracle, You're going to have a big issue on your  
23 hands.

24 And then Larry Page said, we've had discussions  
25 throughout. The CEO of Google, the senior -- the founder with

1 high percentage of the company stock, we continue to have  
2 discussions to this day. There's never been a breakoff.

3 So did Sun, now Oracle, ever say in a way that  
4 Sun/Oracle should have expected Google to rely on, You guys are  
5 off the hook? Of course not. Nonsense.

6 That brings us to B. What do we know about what  
7 Google was thinking? There is no single document, not a single  
8 document, none, none, in which Google says to itself: Wow,  
9 that was great what Jonathan Schwartz said. I guess we don't  
10 have anything to worry about.

11 No e-mail. No -- no text messaging back and forth.  
12 Nothing like that. And only the weakest of testimony in this  
13 courtroom about Google relying on what Jonathan Schwartz said.

14 And, of course, it didn't really matter because  
15 Google had decided early on, Trial Exhibit 7, that, If Sun  
16 didn't want to work with us, Google was going to do Java anyway  
17 and defend our decision, perhaps making enemies along the way.

18 That was the attitude at Google. It didn't matter  
19 what Sun or Oracle said. Google was bent on its Android  
20 strategy and incorporating Java technology.

21 Dan Bornstein, who is the guy, again, who picked the  
22 37 packages, said he made the selection. He said that decision  
23 for Android before the blog post.

24 So there was no reliance during the development  
25 process on anything Jonathan Schwartz or anybody else said.

1 And then you have these internal discussions at  
2 Google, in which they're worried about what's going to happen.  
3 This is Trial Exhibit 180, in which Andy Rubin says to one of  
4 his colleagues, This is touchy, even after the blog post.

5 Recall Trial Exhibit 29 -- again, after the blog  
6 post -- in which Google says, Don't demonstrate Android to any  
7 Sun employees or lawyers.

8 There's Google's understanding that Apache Harmony  
9 was still in dispute. This is Trial Exhibit 405, in which Bob  
10 Lee says, Apache Harmony, there are restrictions. We can't use  
11 it on mobile devices, even though that's water under the bridge  
12 at this point.

13 Google's decisions were made by Google without regard  
14 to anything Sun or Oracle said.

15 Trial Exhibit 326, they're worried about Java  
16 lawsuits. If we buy Java, the lawsuits will go away.

17 Eric Schmidt acknowledged in testimony that he was  
18 worried that Google was going to be sued, and so had thought  
19 about buying all the rights to Java.

20 Trial Exhibit 1029. We don't want to stir anything  
21 up for Android. I suspect we should step away and only respond  
22 further if Sun chases after us.

23 So they're hoping that they can get away with it.  
24 And this is the chronology after the SDK announcement, when it  
25 becomes clear what exactly Android is about, e-mail after



1 e-mail on this timeline, showing that Google did not rely on  
2 the blog post.

3 And then Oracle steps into the picture. There's a  
4 new sheriff in town. Strong company. Willing and able to  
5 stand up to Google and defend the intellectual property rights  
6 at issue in ways that Jonathan Schwartz maybe just wasn't  
7 capable of doing.

8 And so Oracle goes to Google and says, You guys need  
9 to get licensed. And did Google ever said -- Google ever say,  
10 oh, we relied on Jonathan Schwartz? He said we were okay.

11 No.

12 Both negotiators, Safra Catz and Hasan Rizvi, said in  
13 all their discussions with Google, Google never said, oh, we  
14 thought we were off the hook; Jonathan told us we were fine.

15 It was never said.

16 And you will recall an instruction you just heard  
17 from Judge Alsup on this. If something was not done -- if  
18 there's no evidence that something was done, that is evidence  
19 it was not done.

20 There is no evidence that Google ever said to Sun or  
21 Oracle, We relied on Jonathan Schwartz.

22 **THE COURT:** Mr. Jacobs, you're past the 60 minutes,  
23 at this point.

24 **MR. JACOBS:** Yes. We have 90; right, Your Honor?

25 **THE COURT:** You do, yes.

1           **MR. JACOBS:** And so what that brings us to is one of  
2 the e-mails we started this trial with.

3           August 6, 2010. Tim Lindholm writes to Andy Rubin:  
4           "What we've been actually asked to do by  
5           Larry and Sergey is to investigate what  
6           technical alternatives exist to Java for  
7           Android and Chrome. We've been over a bunch  
8           of these, and think they all suck. We  
9           conclude that we need to negotiate a license  
10          for Java under the terms we need."

11          One week before the lawsuit was filed. Did  
12 Mr. Lindholm say, we think we're off the hook here, anyway,  
13 because of what the blog post said? Of course not. Google's a  
14 big company. They know business isn't done by blog posts.

15          And, instead, what Mr. Lindholm told Andy Rubin was,  
16 We need to negotiate a license.

17          And you actually heard from Eric Schmidt, Google's  
18 chairman and CEO, about this e-mail.

19          **"QUESTION:** Were you aware in or about August  
20 of 2010 that Larry and Sergey had asked  
21 Mr. Lindholm to do this?

22          **"ANSWER:** I was aware at the time that we  
23 were thinking about what to do."

24          So here we are, 2012. Google still doesn't have a  
25 license. They're using the Java intellectual property.

1 They're using it without permission. They're using it for a  
2 business purpose. Not for charity or education or research.

3 They took the Java intellectual property, the 37  
4 packages, and they put it in Android because it suited them to  
5 get to market faster, to capture the developer community, to  
6 leverage off of Sun, now Oracle's, investment in Java.

7 And this system of ours calls upon us to ask you for  
8 help in resolving this matter. It calls upon us to ask you to  
9 tick various boxes on this verdict form.

10 And on this question, 4.A. and 4.B., we ask that you  
11 tick "No." The blog post is not a license.

12 And when it comes to infringement, we ask that you  
13 tick "Yes," in order to hold Google accountable for its use of  
14 this Java intellectual property in Android without permission.

15 Give it to you.

16 **THE COURT:** Thank you, Mr. Jacobs.

17 We will -- I think it's best to -- not to interrupt  
18 the next closing, so it's best to take our 15-minute break at  
19 this time.

20 Now, you've heard part of the closings. You may not  
21 talk about the closings. You may not talk about the case or  
22 the evidence. Very soon, it's going to be your duty to do  
23 that, but not yet, please.

24 So we'll see you back here in 15 minutes.

25 **THE CLERK:** All rise.

1 (Jury out at 9:14 a.m.)

2 **THE COURT:** All right. Please be seated. Any issues  
3 for the Court?

4 **MR. VAN NEST:** No, Your Honor.

5 **THE COURT:** All right. Great. So you are free to  
6 set up the courtroom any way you want. And we will go -- push  
7 all the way through your entire 90 minutes, and take the next  
8 break.

9 **MR. VAN NEST:** Perfect. Thank you, Your Honor.

10 **THE COURT:** Thank you.

11 (Recess taken from 9:15 to 9:30 a.m.)

12 **THE COURT:** Are we ready?

13 **MR. VAN NEST:** We're ready, Your Honor.

14 **THE COURT:** Are there any issues before we resume?

15 **MR. VAN NEST:** I don't believe so.

16 **THE COURT:** Just so the public will know -- it's  
17 pretty full out there -- the court security officers will not  
18 let anyone in once we start with the closings. I just don't  
19 want there to be any distraction.

20 So is there anyone out there waiting to get in?

21 **COUR SECURITY OFFICER:** No, Your Honor.

22 **THE COURT:** Once we start, they'll just have to wait  
23 90 minutes, I guess.

24 And if anybody needs to leave, now is the time to do  
25 it. I can't say never. If you have to get up and leave in the

1 middle of the closing, you can; but, it is a distraction when  
2 that occurs. And I want the lawyers to have the benefit of  
3 every second of the attention of the jury.

4 All right. So let's bring the jury in.

5 (Jury enters at 9:32 a.m.)

6 **THE COURT:** Please be seated.

7 Someone is coughing over there. Would you like a  
8 cough drop?

9 **UNIDENTIFIED SPEAKER:** I have one. Thank you.

10 **THE COURT:** You have one.

11 Please, no distractions.

12 Are you all ready over there? Pay full attention  
13 now.

14 At this time, on behalf of Google, Inc., Mr. Van Nest  
15 will give the closing summation.

16 The floor is yours.

17 **CLOSING ARGUMENT**

18 **MR. VAN NEST:** Thank you very much, Your Honor.

19 Good morning, everyone.

20 **JURORS:** (Responding simultaneously) Good morning.

21 **MR. VAN NEST:** Welcome back from the weekend.

22 And I want to say it's been a great privilege for me  
23 to represent Google during our Phase One trial. And especially  
24 with a group that's been paying as close attention as you  
25 have. And we do really appreciate that.

1 And that's a good thing because the evidence that  
2 you've seen and heard in the courtroom will only support one  
3 verdict. And that's a verdict in favor of Google.

4 Now, last Thursday the chief executive officer of  
5 Sun -- remember, Sun is the plaintiff in this case -- he came  
6 into the courtroom and told you that he was running the company  
7 in 07, '08, '09, 2010, the whole time that we're concerned  
8 about in this lawsuit. And he testified that he didn't see  
9 anything wrong with what Google was doing in Android.

10 Now, Mr. Schwartz, he obviously knew that Google was  
11 using the Java Language in Android. And he knew that Google  
12 was using the 37 Java APIs that we've been spending so much  
13 time on. He knew that.

14 He knew Google didn't have a license from Sun. He  
15 knew Google hadn't passed any of these so-called compatibility  
16 tests or anything of the like. And yet back then, at the time,  
17 he chose to put Sun's support behind Android and he went  
18 public. He said it on a public website, sponsored by Sun.

19 And then he came in here and testified under oath  
20 that we didn't have grounds to sue. That's what you heard  
21 Thursday, from the chief executive officer of Sun.

22 Now, the evidence that you've seen and heard, in all  
23 of it, backs up the fact that Mr. Schwartz was exactly right.  
24 There is no copyright infringement here, and Oracle didn't  
25 prove a thing.

1           Android was an independent implementation, in which  
2 Google engineers using their own ingenuity and open source  
3 products like Apache Harmony, built Android from scratch.

4           And your job is going to be to compare the structure,  
5 selection and organization of those 37 API packages to a much  
6 bigger thing, to the entirety of the Java SE 5.0 platform. A  
7 comparison that they didn't even talk about in 65 minutes that  
8 Mr. Jacobs was up here before you.

9           Android is custom-built for smart phone. Java SE 5.0  
10 is built for desktops. It's a totally different thing.

11           And Android took those 37 APIs and transformed them  
12 into the only working version of a complete software stack, to  
13 provide all the functionality that we now enjoy.

14           So that's point one. There is no infringement.  
15 There was no copying. Google played it by the book. And we'll  
16 prove that through the witnesses and the trial exhibits.

17           Two, Google didn't need a license from Sun.

18           Ask yourselves this: We're now down to talking about  
19 something called structure, sequence and organization. Did you  
20 see a word of that in any of the communication back and forth  
21 between Google and Sun? Not a word.

22           They didn't even talk about Java APIs, let alone  
23 something called structure, sequence and organization.

24           They were negotiating for Google to take Sun  
25 proprietary products, implementing code, their class libraries,

1 their virtual machine, and make that public as part of an open  
2 source platform. That is something you need a license for.

3 But once it was clear that Google and Sun couldn't  
4 reach agreement, Google went forward on its own, using code  
5 from Apache Harmony and its own engineers, and built Android.  
6 And when it was released, Sun said, no problem, welcome,  
7 congratulations, welcome to the Java community.

8 Third point. Google's use of these 37 Java APIs in  
9 Android was open, known by everyone, completely fair.

10 For years, Sun had been promoting the use of the Java  
11 programming language. That was their whole business plan. You  
12 heard that from every single executive at Sun, that testified.  
13 Schwartz said it. Schmidt's said it. Everybody said it. Even  
14 the engineers said it. They were making the language  
15 available.

16 Well, what is Android? Android is an open source  
17 platform. Google doesn't license it or sell it or charge money  
18 for it. Anybody can use it. Including Sun. Including Oracle.

19 No one was excluded from the platform. It was  
20 available for everyone to work on that chose to do so.

21 And, Android is a brand-new thing. It is  
22 transformative. It's a brand-new thing.

23 We'll talk in some detail about Sun's efforts to  
24 build a smart phone stack. They were a failure. Using the  
25 same APIs. And they were the experts.



1           Java has been transformed in Android, just like  
2 Jonathan Schwartz said it would be. That's what he meant when  
3 he said Android has strapped a set of rockets onto Java.  
4 That's the whole point.

5           And, finally -- this is equally important -- you  
6 haven't heard a scrap of evidence that there was any injury to  
7 Sun or Oracle or Java.

8           Come on. Profits are up. Profit on Java are up at  
9 Oracle. That's what the evidence is.

10           And Java Language is still the most popular language  
11 in the world. More and more people are using Java than ever,  
12 and partly because of Android. Android has made Java even more  
13 popular than it was before.

14           So, despite all the buildup for this case, I don't  
15 think it's even close. They haven't shown anywhere near what  
16 they need to show to prove infringement or to rebut fair use or  
17 to establish any of the other claims that you heard about in  
18 Mr. Jacobs' opening statement. And, as a result of that,  
19 Google deserves your verdict.

20           Now, what I'm going to do is walk through each of the  
21 verdict questions that you have, and I'm going to summarize the  
22 evidence on each one. But I'm going to start with the slide  
23 that I used at the beginning of the opening because I think the  
24 points that we made there have all been proven and they're all  
25 relevant to these questions that you have to decide.

1           So the first point that I led off with was that Sun  
2 gave the Java Language to the public. Right?

3           We now know that for sure. And Mr. Schwartz,  
4 Mr. Schmidt and all the witnesses pointed out that along with  
5 the language, the APIs were given, too. Those were part of  
6 what Sun was promoting for widespread use of Java Language.

7           Two, Google built Android independently. They used  
8 free and open technologies.

9           I heard a lot about copying. There is no evidence of  
10 copying. Once it was clear that Sun would not agree to sell  
11 its technology, Mr. Rubin, Mr. Bornstein, and the rest of the  
12 guys went to work and built Android from scratch.

13           They talk about a dirty clean room.

14           Nine lines of code out of 15 million. They scoured  
15 Android up and down.

16           Don't you remember Dr. Mitchell's testimony? They  
17 got a special device, a code comparison tool, and they scoured  
18 this thing up and down. And they found nine lines of code that  
19 were the same out of 15 million.

20           So don't talk to me about a dirty clean room. That's  
21 a pretty darn good job, because the evidence is the outcome.  
22 The outcome of Android is it's a separate implementation done  
23 by Google engineers.

24           Next point. Google made fair use of the Java  
25 Language APIs. Fair use means we can use some copyrighted work

1 in certain circumstances to promote transformation, promote  
2 innovation, and promote the public good. And that's exactly  
3 what Android is all about. And we'll talk about that in some  
4 detail.

5 And, finally, -- and this one is pretty darn clear  
6 from last week -- Sun publicly approved Android's use of Java.

7 They publicly approved it. And I'm not just talking  
8 about Mr. Schwartz' blog. I'm talking about meetings with  
9 Mr. Schmidt, meetings with Mr. Rubin, featuring Android at  
10 developer conferences and all the rest of it.

11 Both Sun and Oracle were trying to use Android to  
12 build their own products. And it isn't until after they failed  
13 that they brought this lawsuit here.

14 All right. Sun gave the Java Language to the public.  
15 The Java Language is open and free for everybody to use. And  
16 that's critical because there is no claim that Google's use of  
17 Java Language is protectable, whatsoever. And it's not.

18 The language has been out there. Every single  
19 witness said that. Mr. Schwartz said it. Mr. Schmidt said it.  
20 The engineers said it.

21 And in Mr. Jacobs' opening statement he said, We  
22 don't care about the language. You can use the language to  
23 your heart's content.

24 And that's an important point because that's why --  
25 we'll come to in a minute -- that's why all they can accuse in

1 Android is this so-called structure, sequence and organization.

2 They are not accusing the whole thing because they can't.

3 The language is free for anyone to use.

4 Next.

5 The APIs were marketed along with the language. In  
6 other words, free and available for everyone.

7 "Yes. Absolutely. We talked about open  
8 APIs, and then you compete on  
9 implementations."

10 What does that mean? That means everybody can use  
11 the standard. Everybody can use the standard. And we compete  
12 by implementing source code.

13 This is just what Josh Bloch told you when he was  
14 here. This is the standard. These are the names and the  
15 declarations (indicating) that everybody has to use when  
16 they're writing in the Java Language. This is the  
17 implementation (indicating).

18 And I'm not going to apologize that it's only three  
19 lines long. Did you expect Mr. Bloch to write a 40-pager in  
20 here? He certainly could have.

21 The point of this is, this is the declaration that  
22 everybody must use when they're writing in Java. The  
23 implementation. That's what people compete on. And that's  
24 what is completely different in Android.

25 So these APIs were promoted. They were put into

1 books. They were taught in the universities. They were  
2 featured at developer conferences. They were out there for  
3 everybody to use.

4 And the engineers told us, both Mr. Bloch and  
5 Mr. Lindholm -- these are long-time Java guys. They started  
6 their careers at Sun. They're at Google now, but they started  
7 their careers at Sun. And they both said, I never realized  
8 somebody could protect an API. I thought anybody could use an  
9 API. And that's what I've been doing, and that's what the  
10 whole developer world has been doing, is using these APIs as a  
11 standard and building their own.

12 There were lots of examples of this, that Sun  
13 encouraged.

14 Next slide, please.

15 Apache Harmony. What is Apache Harmony? Apache  
16 Harmony is independent from Sun. And they produced a set of  
17 class libraries using the same APIs that are being criticized  
18 here.

19 They didn't have a license from Sun. They were  
20 allowed to publish. And the best authority on that, again, is  
21 Schwartz, because he was the guy running the company. And this  
22 is something he said back in the day. Not here. Back in the  
23 day. He said:

24 "There is no reason that Apache cannot ship  
25 Harmony today."

1           That's an example of what I mean when I say  
2 independent implementation. They were out there. Now, they  
3 made a big deal, Oh, this was limited, you couldn't use it in  
4 mobile. Not so.

5           Mr. Schwartz testified last week.

6           See our next slide, please.

7           They had a full chance to examine him on this, and  
8 they asked him: Your testimony is that if they -- that's  
9 Apache -- didn't want to call it Java, this fight didn't exist?

10          I made the statement time and time again in the  
11 media. They are more than happy to ship -- or we're more than  
12 happy for them to ship their code. They just can't call it  
13 Java.

14          Including on mobile devices, sir?

15          Absolutely. Absolutely.

16          Apache didn't take a license from Sun. There was no  
17 restriction. And so when the negotiations between Google and  
18 Sun failed, there was not one thing wrong with Google using  
19 open source technology from Apache or GNU or Bouncy Castle or  
20 any of these other open source projects you've heard about.

21          Now, Apache was not the only example. There's  
22 another big example: GNU Classpath. That's the same type of  
23 thing, but it happened in the '90s. That happened in the '90s.  
24 And in the '90s, GNU created a whole set of Java libraries,  
25 Java API libraries.

1           They created a whole virtual machine. They did the  
2 source code independently, just like Android is, just like  
3 Apache is. And guess what? Remember Josh Bloch's testimony?  
4 When he was at Sun, he helped GNU get off the ground.

5           With the full knowledge of his boss, people at Sun  
6 were helping these independent folks develop their own  
7 independent implementations. Why? It was part of the business  
8 plan. Let's spread Java all over the world. Let's have lots  
9 of people using Java. Let's get everybody out there using Java  
10 and we will sell them services, support and the like.

11           So just to set the table, nobody came to this with a  
12 blank slate. The history was the language was free; the APIs  
13 were promoted with the language; and there were lots of  
14 examples of people doing it with Sun's blessing before Android  
15 even came along.

16           Okay. Let's talk about copyright infringement.  
17 That's the big issue in this case, and it relates to the second  
18 point I made in the opening. Google built Android using free  
19 and open technologies and its own engineering.

20           Copyright infringement requires that you copy  
21 something. And there was no copying here because Google knew  
22 they couldn't use the Sun Java source code. That's what it  
23 meant to say we're going to design from open source.

24           Here's their first verdict form, your first verdict  
25 question. And let me just make one point right up front. The

1 most important question on the whole verdict form is  
2 Question 1. Question 2 relates to the users manual.  
3 Question 3 is nine lines of code. And Question 4 is, was  
4 Mr. Schwartz and Sun approving?

5 So Question 1 is the one I'm going to spend most of  
6 my time on. There's two parts to it. There's copyright  
7 infringement and there's fair use. And we're going to talk  
8 about those one at a time.

9 Now, on this first one you can see Oracle has the  
10 burden of proof. They have to prove their case. So if it's  
11 too confusing or if they didn't make it clear enough, or if  
12 they mucked it up so that the evidence is ambiguous, they lose.  
13 That's what it means to have the burden of proof.

14 They have to prove that it's more likely than not  
15 that copyright infringement occurred.

16 Now, you'll get a very important set of instructions  
17 from Judge Alsup just a little bit later this morning. But  
18 here's probably one of the most important ones. This is Jury  
19 Instruction No. 25.

20 No. 25: "To determine whether the copyrighted  
21 work" -- that's Java SE 5.0 -- "and the accused work" -- that's  
22 Android -- "are substantially similar, you must compare to the  
23 works as whole." I think that should say "works as a whole."  
24 "I will define the works as a whole in a moment."

25 What does that mean? What you're comparing is the



1 structure, sequence and organization in the 37 Android Java  
2 APIs to the work as a whole, Java SE. The work as a whole is  
3 all 166 class libraries, all the compilable code, the names,  
4 the declarations, the parameters, the fields, the implementing  
5 code, everything. It's a total of 2.8 million code lines in  
6 the Java 5.0 SE. It's huge.

7 And you're going to compare that to not all of the  
8 Java 37 APIs, just the structure, sequence and organization.

9 Next slide. So here we go. This is the comparison.  
10 It's Java 2 SE on the left. That's the Oracle copyrighted  
11 work. By the way, built for desktops; never successful on a  
12 smart phone. And Android on the right. And a very particular  
13 part of Android, which we're going to look at in a minute.

14 So you remember the Android platform. This is the  
15 platform that Mr. Rubin, Mr. Bornstein and all the engineers  
16 built. And as I showed you in the opening, these 37 Java APIs  
17 are a very, very small part of that. Where are they? They're  
18 in the core library. There's 37 Java API packages.

19 And all we're talking about is structure, sequence  
20 and organization. Why? Why are those not shaded in and filled  
21 in? Why are they just an outline? Because the source code,  
22 the code that does the work, the implementing code, they can't  
23 accuse that of infringement because it's all completely  
24 different in Android than it is in Sun's copyrighted work.  
25 That's what Dr. Mitchell admitted, finally, on the stand on

1 Friday.

2           We got some help from Judge Alsup pressing the point.  
3 Other than the nine lines of code in rangeCheck, everything in  
4 Android is original, done either by Google, done by Apache,  
5 done by open source.

6           So we're only talking about structure, sequence and  
7 organization. It's not the use of the language. It's not the  
8 use of the names. You'll get Jury Instruction 20. Judge Alsup  
9 will tell you point blank, the names standing alone are not  
10 protectable. Anyone can use "max." Anyone can use "lang."  
11 Anyone can use "java.max.lang." Those aren't protectable. So  
12 it's just structure, sequence and organization.

13           Now, you might be asking yourself, what the heck is  
14 that? Well, what the heck is that?

15           It's a darn good question. Because you won't get the  
16 answer to that looking at anything that was actually discussed  
17 by the parties in the day. This is something made up for the  
18 lawsuit because there is not a word in anything that was  
19 exchanged between Sun and Google that says we want to protect  
20 structure, sequence and organization.

21           You're going to see a lot of trial exhibit numbers.  
22 And I invite you to write them all down. I'm going to show you  
23 a bunch in a minute. There's nothing in there. Nobody was  
24 talking about Java APIs. Everybody assumed they were free to  
25 use. They're part of the language. None of this.

1           So it's not there. It's not the language. It's not  
2 the names. It's not the implementing code, because that's  
3 original, as Dr. Mitchell admitted finally on Friday.

4           So what is it? It's only the system of organization.  
5 That's what they're trying to protect. The system of  
6 organization. And, yes, what's that? My file cabinet. My  
7 file cabinet. I'm not going to apologize one minute for this  
8 because it's the only way I can understand what structure,  
9 sequence and organization are.

10           You know now from hearing from Astrachan and Mitchell  
11 and all the engineers that when you write in Java, methods are  
12 organized into classes. Classes are organized into packages.  
13 That's how it works.

14           And so if I have a package, I might want to call it  
15 java.lang. And my package is my cabinet. I have classes  
16 within java.lang. They're the drawers. There are methods  
17 within each class. They're the file folders inside, including  
18 max and everything else in between.

19           And what's inside the file folders? The source code,  
20 the implementing source code, every line of which was written  
21 by Google or taken from open source subjects. So this  
22 structure, sequence and organization is only a method of  
23 organization. That's what it is. And you're going to compare  
24 that, according to Judge Alsup's instructions, against the  
25 entirety of the Java SE.

1           Now, let me pause a minute. There is some  
2 similarity, yes, between the 37 API packages in Android and the  
3 37 packages in Java SE. But that's not the comparison. You're  
4 to compare to the work as a whole, the whole thing.

5           So all this talk about 37 and 37, that is wrong.  
6 That is wrong legally and it is not the consideration, it is  
7 not the instruction you'll be given by Judge Alsup.

8           And guess what? The similarity comes from the fact  
9 that if you're writing in the Java Language and you want Java  
10 code to run on your platform, as you now know from Astrachan,  
11 Mitchell, Bloch and every other engineer that addressed it, you  
12 must use the fully-qualified name.

13           If you don't use `java.lang.math.max`, all that code  
14 written by application programmers that's out there will not  
15 run.

16           So there's similarity. The similarity comes from the  
17 fact that if you're using the language, you must use qualified  
18 names in order to allow the code to run.

19           Okay. So let's talk about work as a whole. This is  
20 a really critical point. Judge Alsup is going to define it for  
21 you. Work as a whole means all of the compilable code  
22 associated with all of the 166 API packages. Not just the 37.  
23 That's what I'm talking about. It's all 166.

24           Now, I don't have it on the screen here, but  
25 Instruction No. 18 tells you what's in the compilable code. It

1 includes method names, class names, declarations, organization  
2 and all of the implementing source code. That's all in  
3 Instruction 18. That's everything here: The names, the  
4 declarations, the implementing code, the whole nine yards.

5           There's my glasses.

6           (Laughter)

7           **MR. VAN NEST:** Wondered where those went.

8           So what is that? That's all 166 packages including  
9 the source code. Let's see it. It's a big one. This is Java  
10 SE 5.0. This is built for desktops. It's got a lot of  
11 functionality that you would never use in a smart phone.  
12 Never. And it is 2.8 million lines of code. Because the work  
13 as a whole includes all the libraries, all the code, all the  
14 names, all the declarations, every single thing you'll see in  
15 Instruction 18 and Instruction 29.

16           All right. Now, what are we going to compare that  
17 to? We're going to compare that to the structure, sequence and  
18 organization of these 37 API packages. What is that? Why are  
19 those not filled in?

20           Because they can't accuse the implementing source  
21 code. That's why we're only talking about structure and  
22 sequence and organization.

23           The code in Android was not copied, and they now  
24 admit that. And Judge Alsup's instructions are going to tell  
25 you that, too.

1 All we're talking about is the lines of names and  
2 declarations. That's all that makes up the structure. It's  
3 the names and declarations. It's the structure of the file  
4 cabinet. They're right up here (indicating). That's what  
5 we're talking about.

6 They have to prove that the thing on the right is  
7 substantially similar to the thing on the left. And they  
8 haven't proven a thing when it comes to that, not one thing.  
9 Those things aren't substantially similar. They're not even in  
10 the ballpark.

11 What do I mean when I say the source code --  
12 implementing source code is different?

13 Could I have my next slide.

14 You saw this. This is source code. On the left is  
15 what's in the copyrighted work, 5.0, and on the right is  
16 Android.

17 Let's see the source code. The source code is  
18 totally different. And Dr. Mitchell admitted that finally on  
19 Friday. The source code implementing Android is different.

20 The first line of each of these is the same. That's  
21 the method declaration that you must use to implement the code.  
22 That first line is the same. That's part of the structure,  
23 sequence and organization. The code is different. All of it.

24 Let's go on to the next slide. What are the numbers?  
25 What are the numbers? Now, it's not just about numbers, but

1 numbers are important too.

2           You saw this chart. Mr. Baber and Mr. Astrachan  
3 talked about it Friday. It has a lot of comparisons, some of  
4 which are no longer relevant given the job you have to do. So  
5 let's look on the left.

6           All API packages in Oracle's JDK 1.5. That's the SE  
7 5.0 copyright. 2.8 million lines of code. How much code in  
8 the 37 API packages for Android? 287,000. That's a lot.

9           But, guess what, that includes all of the  
10 implementing source code, which doesn't count because that is  
11 different in Android.

12           Let's go down to what there is that makes up the  
13 skeletal structure, sequence and organization. It's 10,000  
14 lines of code.

15           How do you know that? Dr. Astrachan testified about  
16 it. And Dr. Reinhold and Dr. Mitchell both said that's about  
17 right. Astrachan said 7,000 lines. And Reinhold and Mitchell,  
18 they weren't quite sure, but they said 7- to 10,000, that's  
19 about right.

20           So 10,000 lines. What is that? That's these method  
21 declarations and names -- and that's all it is -- that make up  
22 the 37 API packages.

23           Next slide. So here's a comparison. You're  
24 comparing all the functionality, including the source code, in  
25 the Java 2 SE. All of it. 2.8 million lines of code against

1 only the structure, sequence and organization in Android.

2           It's 10,000 -- 10,000 lines of code. That is less  
3 than one half of 1 percent. Less than one half of 1 percent.  
4 And it doesn't provide any of the functionality. The  
5 functionality in Android is provided by the source code, which  
6 the Google engineers wrote or used from Apache.

7           So these things are completely separate things. And  
8 you are comparing the entire functionality of Java 2 SE against  
9 only the structure, sequence and organization. There is no way  
10 in the world that those could be found substantially similar.

11           And the burden of proof is on Oracle. It's their  
12 burdens to prove that it is more probable than not, more likely  
13 than not that those are similar.

14           Now, you have one very important piece of testimony  
15 from Dr. Astrachan on this. He was probably the only expert  
16 that was asked this question. Dr. Mitchell wasn't asked.

17           He got up. Dr. Mitchell said, well, I think they  
18 copied; I think they copied; I think they copied. But he  
19 hadn't heard from Rubin or Bornstein or the engineers.

20           This is what Dr. Astrachan said.

21           He said, Have you formed an opinion as to whether  
22 these things are substantially similar or not?

23           Those are very different.

24           Why? He said two things. He said the numbers are  
25 totally different. The copyrighted work is huge. And the



1 amount of code we're talking about in the structure, sequence,  
2 and organization in Android is small.

3 And the other big reason was that the implementing  
4 code is completely different. Again, Astrachan and Mitchell  
5 are on the same page with respect to that. They both concede  
6 that the implementing code is completely different.

7 Now, you're going to hear, I'm sure, when Mr. Jacobs  
8 gets back up, this is all irrelevant because they copied. This  
9 is all irrelevant.

10 Well, what's the evidence on that? Okay. The  
11 evidence on that is that poor old Josh Bloch used nine lines of  
12 code in 2009 that got into the Android platform. But apart  
13 from that, the source code implementation in Android completely  
14 different.

15 Rubin testified. Bornstein testified. You saw the  
16 contract with Noser. They told Noser, you can't use anybody's  
17 proprietary code. You've got to use open source. Apache?  
18 Okay. Bouncy Castle? Okay. Classpath? Okay. You can use  
19 open source. And that's all the Google guys did.

20 And the proof of that is that the implementing code  
21 in Android is completely different. And the similarities arise  
22 simply from the fact that the declarations have to be the same.

23 Now, I want to comment on one tactic that, I think,  
24 has been repeatedly imposed on all of us. And that is,  
25 Oracle's whole strategy here is to say, this is so complicated,

1 none of us can ever understand it. These APIs, these  
2 interfaces, they're so complex.

3 Let's see our next slide.

4 This is one of the slides from Dr. Mitchell. Boy,  
5 that clears things up; doesn't it? I mean, their whole point  
6 is nobody can ever understand this, it's so sophisticated.

7 Well, guess what? All this is, is a list of methods,  
8 classes and packages. So this happens to be the package for  
9 Buffer. So if I put a file cabinet next to Buffer, my file  
10 cabinet is my path. What is below Buffer? Everything along  
11 the top line there, those are all classes. They're classes  
12 organized within Buffer. And I've got classes in my cabinet,  
13 too: Math, number, object, process.

14 What else is there? A bunch of methods. There's a  
15 bunch of methods, and there's methods in each class. Those  
16 methods are the folders inside.

17 And the only criticism I got from Mitchell on this  
18 was, oh, this doesn't take into account the complexity of it  
19 because there's all these interfaces. Well, yes, there's  
20 interfaces. Some of these classes are related to classes in  
21 other packages.

22 But you know what? That's not too complicated  
23 either, because the only thing that they ever do -- that they  
24 ever do in the source code is they say this class extends  
25 another class. That's it. That's what the interfaces are.

1           So the math class extends object. There's your  
2 label. The process class extends object and implements  
3 Serializable. That's what this class does. So they label  
4 them. And the labels in the source code look just like that.

5           The biggest label I could find in any of the source  
6 code had five lines on it. It's kind of like in a cookbook.  
7 If you have a bunch of recipes and a bunch of them call for  
8 chicken stock, you wouldn't repeat the recipe for chicken stock  
9 over and over. You'd say, see chicken stock, page 30.

10           These interfaces work in very much the same way.  
11 They coordinate with each other. They're interfaces for each  
12 other. And that's all that they are. They're not too  
13 complicated.

14           And so on Question 1, infringement, we'll ask you to  
15 check "No." Why? They had the burden of proof. The relevant  
16 comparison is 37 structure, sequence and organization to the  
17 entirety of the Java SE 5.0. And Oracle has failed to meet  
18 their burden of proof.

19           Now, I want to comment on one other point that  
20 they've made a lot of, you saw a lot of it in their opening.  
21 And that is their licensing story. Their licensing story isn't  
22 even relevant to infringement, but they've been parading all  
23 these e-mails around.

24           Now, you now know what the licensing story amounts  
25 to. Google tried to negotiate with Sun for a license, for a

1 partnership and for Sun technology.

2           Could I have our first slide?

3           The Sun technology that Rubin was negotiating over is  
4 right here. This is Trial Exhibit 11. This is right near the  
5 last page of the exhibit.

6           Sun's main responsibility is the Java CDC virtual  
7 machine, class libraries, MIDP stack. Those are all source  
8 code implementations. Everybody agrees you need a license for  
9 those. That's what they were negotiating.

10           Next slide.

11           You need a license for the Coffee Cup, that little  
12 Java Coffee Cup. That's a brand license.

13           This is Trial Exhibit 1, one of their favorite  
14 exhibits. You need a Coffee Cup Logo for carrier  
15 certifications.

16           All of the discussions that you've seen fall into a  
17 period when Rubin and the folks at Sun were negotiating over  
18 the purchase of property.

19           Okay. Here's my timeline. And I want to put all  
20 these in context, because remember what Rubin said, and  
21 Schwartz backed him up. It was this period of time in '05 and  
22 '06, when they were negotiating for a partnership which would  
23 have required a license.

24           But once it was clear that they couldn't agree,  
25 that's when Google went forward with Bornstein and the

1 engineers and did a completely independent implementation.

2           So what do we have? We have all of their exhibits.

3 Let's throw them up one at a time here.

4           We've got, Must take a license.

5           Trial Exhibit 1: My proposal is we take a license.

6           Trial Exhibit 7: We'll take a license.

7           Trial Exhibit 12: Critical license.

8           How many times have we heard that? It's not even  
9 relevant to infringement. They don't want to talk about the  
10 relevant comparison. They want to walk around and say, you  
11 guys at Google knew you needed a license.

12           Well, the guys at Google knew they needed a license  
13 if they were going to buy Sun technology. Look at the dates on  
14 these. They're all right here in this period of time. They're  
15 all right here (indicating). Everything. All the trial  
16 exhibits that deal with this negotiation are in '05 and early  
17 '06, and that's it.

18           Now, there's one exception, and that's the e-mail  
19 Mr. Lindholm sent. That wasn't sent until about a week before  
20 the lawsuit was filed. That has nothing to do with the  
21 negotiations that Sun and Google were engaged in.

22           You heard from Mr. Lindholm. He's an engineer. He  
23 wasn't even part of the Android team. He didn't write any code  
24 for Android. And he was asked to do something back there in  
25 2010, after Sun had been purchased by Oracle, after Oracle had

1 threatened litigation.

2           And there isn't a scrap of evidence that his e-mail  
3 has anything to do with copyrights or copyright protection or  
4 anything of the like. Anything of the like. All of these  
5 e-mails were in there that earlier period of time, and they all  
6 relate to a time at which everybody agreed that you would need  
7 a license.

8           What's the best evidence that Google didn't need a  
9 license? Right here. Jonathan Schwartz knew that Google  
10 didn't have a license. And he knew that Google was using the  
11 language and the APIs. They'd been real clear on that.

12           Nothing was done in secret here. This was all out in  
13 the open. And what he testified to was we didn't feel we had  
14 any grounds. Google had made an independent implementation.  
15 There's nothing wrong with using the Java Language. And  
16 everybody was aware, at the time, that Google was using the  
17 Java APIs.

18           Okay. I think that is Question 1.A. to a T. Google  
19 didn't need a license. Sun knew it. The comparison is clear.  
20 These aren't substantially similar.

21           You know from the testimony that Google used Apache  
22 Harmony code -- which was available for anyone to use -- and  
23 their own ingenuity. And there was no copying, and, therefore,  
24 no copyright infringement, because the two comparisons side by  
25 side are not substantially similar.

1           Now, fair use is an important concept. I talked  
2 about this in the opening. Google made fair use of the Java  
3 Language APIs in Android. You're going to be asked a second  
4 question. Now, you may not get to it because if you find no  
5 copyright infringement --

6           -- Could we have the next slide --

7           -- then you don't even go on to fair use. It only  
8 comes into play if you find copyright infringement in the first  
9 place.

10           So why am I talking about it? I can't afford to  
11 leave any stone unturned on behalf of Google. No lawyer would.  
12 I can't leave any stone unturned.

13           So even though I believe the evidence supports a "No"  
14 on Question 1.A., I want to talk about Question 1.B.

15           Google has the burden to prove that its use of the  
16 structure, sequence and organization constituted fair use.

17           Now, we're not talking about using source code,  
18 because Google didn't. We're not talking about the language.  
19 We're not talking about names. We're only talking about this  
20 thing called structure, sequence and organization.

21           The law allows for some use of a copyrighted work  
22 even if the owner doesn't consent. I'll show you the  
23 instruction in a minute.

24           The idea here is we want to balance the rights of a  
25 copyright owner against the rights of the public to innovation,

1 advancement, and a lot of other things; free speech, criticism,  
2 news reporting, and all that.

3           So we're balancing innovation against the rights of  
4 the copyright holder. And in that situation the law says the  
5 copyright owner cannot prevent someone from making a fair use.  
6 Even if they have a copyright, they can't prevent someone from  
7 making a fair use. And the law gives you a bunch of factors to  
8 evaluate.

9           Let's look at the first instruction on fair use.  
10 This is the instruction that Judge Alsup will give you when  
11 we're done talking.

12           Anyone may use any copyrighted work in a reasonable  
13 way under the circumstances, without the consent of the owner  
14 if it would advance the public interest. Such use of a  
15 copyright work is called "fair use." Just what I said. The  
16 owner of a copyright cannot prevent others from making fair use  
17 of the copyright owner's work.

18           Now, Google made fair use that was fully known to Sun  
19 by making Android an open platform that anyone could use, by  
20 making it available for free, by not licensing and charging it,  
21 and because it was a huge innovation. It transformed what  
22 these 37 Java APIs had been.

23           Sun hadn't been able to use these in anything like a  
24 smart phone stack. There may be a few uses of Java in  
25 Blackberry, but it is not the Blackberry stack. And nobody



1 proved that to you, anyway.

2           Java was something that Sun was trying to get to work  
3 as a smart phone platform so they could compete with Apple and  
4 so on. But that didn't happen until Android came along and  
5 transformed these APIs as part of a phenomenal new product that  
6 was different and brand-new. That's the point on fair use.

7           So let's look at the factors. There are four  
8 factors. And, by the way, what you do is you balance these all  
9 together and use your common sense. No one of these factors is  
10 more important than the others. They are all to be balanced  
11 and weighed together.

12           So let's look at the first one:

13           Purpose and character of the use. This is common  
14 sense. How are you using it? How are you using it? Android  
15 is used as part of an open source platform that's available to  
16 everybody.

17           Two. Nature of the copyrighted work. We're going to  
18 protect works like Shakespeare more than we will a user's  
19 manual. So we look at the nature of the copyrighted work and  
20 we determine how much protection should it have.

21           We'll talk about that.

22           The third one is amount and substantiality of the  
23 portion used in relation to the copyrighted work as a whole.  
24 Did you use the whole thing or part of the thing?

25           And here we'll talk, again, about 2.8 million lines

1 of code in Java SE, and these 10,000 lines of code that form  
2 the structure, sequence and organization in Android.

3 And, finally, the effect of the use upon the  
4 potential market. And that's why I say it's critical to know  
5 that they didn't prove anything about market harm. Not a  
6 thing.

7 We'll talk about the so-called threat of  
8 fragmentation and, oh, they're not compatible, and all that  
9 stuff. But when it comes down to what facts they proved, the  
10 only fact is Java business is up 10 percent year over year at  
11 Oracle.

12 Can we look at the next one here, Ben?

13 This is important too. All the factors should be  
14 weighed together to decide whether Google's use was fair or  
15 not. It's up to you. It's up to you to decide how much  
16 weight.

17 Jury Instruction No. 26. If you find that Google is  
18 transformative and that the open source nature of it is a fair  
19 use, that's what these instructions are -- will allow you to  
20 do.

21 Okay. Let's talk about purpose and character of use.  
22 Factor one, I've said it. It's clear. Everybody knows it.  
23 Android was always intended to be open source. From Trial  
24 Exhibit 1 --

25 Next slide.

1           From Trial Exhibit 1 on, the whole plan was, let's  
2 put this product together, let's make a brand-new product, and  
3 let's give it away.

4           Now, yes, it's definitely true that Google makes  
5 money selling ads on Android. They make money in the same way  
6 that Google makes money on all of its other products, desktops  
7 and so on and so forth. That's what they do.

8           The point is Google doesn't make any money by  
9 licensing or selling Android. They decided to make it open.  
10 So open that Sun could use it, that Oracle could use it, that  
11 all these handset makers could use it to foster innovation and  
12 get widespread use. That was the whole point of it, not to  
13 make it a proprietary product but to make it available for  
14 everybody.

15           Next slide.

16           And here was -- this is Trial Exhibit 11. You won't  
17 have these graphics, by the way, in the jury room. That's why  
18 I'm encouraging folks to write down trial exhibit numbers.  
19 These graphics you won't have. You'll have the trial exhibits.

20           Google wanted to collaboratively develop an open  
21 source handset platform. Collaboratively develop an open  
22 source platform.

23           Now, get guess what? They invited Sun. They invited  
24 Sun both before Android launched and after.

25           Our next slide shows correspondence in the day

1 between Mr. Schwartz and Mr. Schmidt. And remember after  
2 Android launched, Mr. Schwartz and Mr. Schmidt sat down at Sun  
3 and they talked about Android. And Mr. Schwartz wanted to  
4 know, can I build my own products, our own Sun products on top  
5 of Android?

6 Here's the answer from Schmidt: As a result, Sun  
7 will be able to take Android and do whatever you like to it,  
8 subject to the license.

9 What's the license? That's the Apache license. The  
10 Apache license lets you use the Apache code any way you want  
11 and to develop further on top of that.

12 So Sun had an opportunity on Android. And guess  
13 what? They took them up on it. Remember -- I think we'll play  
14 a little clip from this. Remember that after the meeting  
15 Schwartz and Schmidt had, Sun went ahead and developed their  
16 own product running on Android.

17 This thing they now claim is such a hideous copyright  
18 violation, they used it to develop their own product, and they  
19 showed it off at JavaOne in 2008.

20 Let's run this.

21 (Video deposition clip played in open court; not  
22 reported.)

23 **MR. VAN NEST:** Connected life. That's a Java Sun FX  
24 product running on Android. What's the point of that? The  
25 point of that is that Android was open for anybody. Anybody

1 had an opportunity on it. And Sun was well aware of it and  
2 tried to use it. So did Oracle.

3           You'll remember the slide from Mr. Ellison's  
4 testimony. Oracle -- right after Oracle acquired Sun, they  
5 looked at working with Android. They ended up not being able  
6 to do it. They talk here about, let's target the Android  
7 handset manufacturer. Let's target single operating systems  
8 only, Android Linux. Let's run Java ME on Android.

9           So Oracle knew this was open source. Oracle knew  
10 they had an opportunity to compete. They ended up not  
11 competing.

12           And you heard a couple times, well, you can't compete  
13 with free. Well, the Sun Java version is now free, also. So  
14 they could compete. They're free, too. They haven't been able  
15 to do it because Android is a transformative product.

16           Why? Look at all the folks using it. This is what I  
17 mean by open source. None of these people are paying a license  
18 fee to Google for using Android. Handset makers, Kindle,  
19 Barnes & Noble, anybody can build on it. And you didn't  
20 hear -- and -- and it's built up a huge community of developers  
21 writing for Android. It's a whole new business.

22           Okay. Second factor. Let's do this one. Ah, such  
23 work is transformative. A big part of fair use is promulgating  
24 innovation, transformative use. If you're just using the same  
25 thing in the same old way, that tends to cut against fair use.

1 If you're transformative, that is the very essence of fair use.

2 **MR. VAN NEST:** Well, let's take a look at Android  
3 versus Java, Java 5.0, very successful for desktops; very  
4 unsuccessful, completely unsuccessful for smart phones.

5 What's the smart phone platform that Android built?  
6 It's this phenomenal thing that you saw during Mr. Rubin's  
7 testimony. Remember, he talked about the fact the applications  
8 give you phone, give you web browsing, give you home page. You  
9 can use it for playing games, high end graphics. You can go on  
10 the web and shop to your heart's content. You can display  
11 videos on it. It's a whole platform. It's a whole platform  
12 that didn't exist before and transformed the use of Java for a  
13 smart phone stack.

14 Now, let's look at what Java was able to do with  
15 Java. These are internal Sun documents that we got in  
16 discovery.

17 "Java is perceived as stagnant and legacy."

18 That's the problem. It's not that they are trying to  
19 compete with free. It's that you had to transform it to make  
20 it something people would like. They tried.

21 Next slide shows that.

22 (Document displayed)

23 Remember, Mr. Gering was here this week and he talked  
24 about the Acadia project. They bought some technology, Daneel  
25 and Sundroid. What do you think Sundroid is? Sun on Android,

1 Sundroid. That's what Sundroid is. They tried to build a  
2 smart phone, they couldn't do it.

3 Okay, next slide.

4 (Document displayed)

5 Now, talked about the nature and extent of the use  
6 and the transformative nature of Android. You also look at the  
7 nature of the copyrighted work, whether it's creative, which  
8 cuts against fair use, or is it functional or factual.

9 Now, we're not saying that it took a lot of hard work  
10 to develop the APIs in the first place. That's true. But  
11 that's not the key point. The key point is what are these  
12 things? They are functional. They are programming interfaces  
13 that allow folks developing programs to access source code.  
14 That's what they are. And there's plenty of testimony on that.

15 Could we have Mr. Ellison, first witness for Oracle?

16 (Document displayed)

17 "The APIs are a command structure you give to  
18 the program."

19 (Document displayed)

20 So did Dr. Mitchell:

21 "The method is an operation that does  
22 something."

23 Obviously, in order to perform it, the programmer  
24 needs to supply data and then the data comes back. These  
25 things are not an opera. It's not a book. It's not a play.

1 It's not a song. It's not a poem. It's something that was  
2 made to be functional and that cuts in favor of using it in a  
3 transformative way to foster fair use.

4 Third factor is: How much did you use? Did you take  
5 the whole thing and just knock it off or did you use a  
6 relatively small part of it?

7 Let's have the next slide.

8 (Document displayed)

9 You know my position on that is clear as a bell.  
10 10,000 lines of code in the Structure, Sequence and  
11 Organization versus 2.8 million in Java SE 5.

12 The last factor in applying common sense is what  
13 was -- what's the effect of it been? Good or bad on the  
14 copyrighted work? We don't have a scrap of evidence that there  
15 has been any harm whatsoever to Java.

16 (Document displayed)

17 Our next slide shows Java profits at Sun -- oops, let  
18 me back up.

19 They never were able to bring an operating stack to  
20 the market. So that is something that -- they are not  
21 competing because they tried and couldn't do it.

22 Next slide.

23 (Document displayed)

24 Never had a full stack on the market.

25 Next slide.



1 (Document displayed)

2 What's the Java business doing? They still have a  
3 licensing business. They talked about oh, boy, all these guys,  
4 they are not taking licenses any more. The evidence is, the  
5 only evidence on business performance, Java up 10 percent year  
6 over year at Oracle. That was Mr. Risvi, just on Thursday.  
7 The Java business growing at a 10 percent rate.

8 What else? Schwartz.

9 (Document displayed)

10 Schwartz said, "We welcome Android. It's going to  
11 strap a rocket onto Java." "We welcome it."

12 Why? What he said was:

13 "I'd rather have Android using Java, which  
14 we, Sun, can sell to. If there is folks  
15 using Android and using Java, we're relevant.  
16 If Android had gone off and used another  
17 language like C# that Microsoft uses, Sun  
18 becomes irrelevant."

19 That's what Schwartz said on Thursday. I didn't want  
20 to be irrelevant. The reason that I embraced it was it was  
21 good for my business, not bad for my business. Better that  
22 they are Java than that they are some other language. And that  
23 was the whole point of Schwartz and the rocket.

24 Now, the only even argument that I have heard from  
25 the Oracle folks is this repeated drumbeat of fragmentation,

1 fragmentation, fragmentation. Okay? You actually haven't  
2 heard a single developer come in here and say, "Gee, I'm  
3 unhappy about Java because Android fragmented." There is no  
4 evidence of that. It's the business folks at Sun that came in  
5 here and testified. Right? They're people that are trying to  
6 sell. But Java fragmented itself. Android had nothing to do  
7 with it and the evidence on that is just overwhelming.

8 Next slide.

9 (Document displayed)

10 Here is internal email. It's Trial Exhibit 3508.  
11 Internal from Sun. Java is fragmented between Java SE and Java  
12 ME and between Java ME Mobile and TV and within mobile and TV.

13 Fragmentation, their definition of fragmentation at  
14 the start of the trial was "write once, run anywhere." Pretty  
15 soon we heard that didn't work. Then they said, "write once,  
16 run only on the same platform." Remember that? Now we are  
17 down to "write once, run on any Samsung 5.0 phone." That's  
18 about what it is.

19 Look at the next slide. This is the evidence that  
20 you heard from Dr. Reinhold. Fragmentation? Come on. Every  
21 single product on here uses a different number of APIs. Okay.  
22 So Enterprise is different from Standard is different from  
23 Mobile is different from Card. They all have different numbers  
24 of APIs.

25 And then within Mobile, you've got a bunch of

1 flavors. CDC is different from CLDC. CLDC, that's the limited  
2 version. And with the limited version, there's three or four  
3 or five versions of those and they all have their own separate  
4 APIs. It got so bad, it got so bad that the following slide  
5 deck is the one that they tried to keep out of evidence, but  
6 Dr. Jonathan Schwartz put it in.

7 (Document displayed)

8 "Compatibility is Optional." That was the order of  
9 the day. They knew it. And this doesn't have anything to do  
10 with Android, not one thing.

11 Let's look at the next slide. Just put the icing on  
12 it.

13 (Document displayed)

14 This is them in October of 2008. In an open source  
15 world, there are many incompatible implementations making it  
16 more difficult for us to justify strict rules for our  
17 commercial and independent licensees.

18 They fragmented Java themselves and they recognized  
19 it. So, so what I'm asking, based on all the evidence that  
20 you've heard on fair use, is that you apply your common sense,  
21 evaluate the open nature, the free nature, the available  
22 nature, no one is excluded, and the transformative nature of  
23 Android and find that Google used Android and its use of --  
24 excuse me.

25 Google's use of the 37 Java APIs, their Structure,

1 Sequence and Organization was a fair use. And in measuring  
2 that you can also take into account the testimony from  
3 Astrachan, Bloch, Mitchell and everyone else that if you're  
4 trying to achieve compatibility, you must use the same method  
5 declarations and names or the code will not work. That is the  
6 testimony of all the engineers, and you can take that into  
7 account in evaluating fair use, too.

8 Okay. Let's go on to question two. And we're not  
9 going to spend nearly as much time on question two because  
10 there has been an absolutely massive failure of proof here.  
11 I mean, I'm not sure they even tried to prove this one, but  
12 let's focus on what it.

13 This is the User's Manual. We're no longer talking  
14 about Structure, Sequence and Organization. That's not it.  
15 Judge Alsup has been using the phrase, "You mean, the plain  
16 English description of the method?" That's the phrase he's  
17 using and that's exactly what we're talking about here; the  
18 plain English description. And their claim is, Well, Google  
19 copied all those and the User's Manual and so on.

20 So here is the question. Oracle has the burden of  
21 proof. If they fail, if the evidence is ambiguous, the  
22 verdicts falls to Google.

23 So, let's look at some of the language. Just to get  
24 you focused on what this is, this is from the copyrighted work.  
25 And what we're talking about, for example, CharSequence is an

1 interface. CharSequence. And you see the written description  
2 there on the right. It's a readable sequence with Char values.  
3 That's what it is. We're talking about infringement of those.

4 Now, here we're not talking about substantial  
5 similarity any more. We're talking about virtual identity.  
6 Virtually identical. They have to be virtually identical. Why  
7 is that? Because as Judge Alsup will explain in his  
8 instructions, when you're writing in a technical field and  
9 you're both trying to describe the same thing -- a wrench, a  
10 hammer, an API -- you're likely to be using a lot of the same  
11 words. Technical writers write in a technical way. We all  
12 know that. And, therefore, in order to prove infringement,  
13 it's not good enough to show substantial similarity. You have  
14 to show virtual identity.

15 (Document displayed)

16 Here it is. Here it is. Here is jury instruction  
17 No. 24. "Has to be virtually identical." Why? Because the  
18 subject under consideration is a narrow one; namely, these  
19 method names like Math, Number, Object, Process, that's narrow  
20 technical stuff and so we would expect there to be plenty of  
21 similarity. You have to prove virtually identical.

22 Now, did they do that? Did they come even close to  
23 proving that in the thousands of pages of documentation the  
24 Google version is virtually identical? You've got to be  
25 kidding me. We spent maybe 10 minutes on that. Maybe less in

1 the trial.

2 Here is the one example that I got out of Mitchell.  
3 They didn't even ask Mitchell about this. They didn't even ask  
4 him. He had this example in his report, and I had him --  
5 remember, we had the trial director, Ben pulled up the version  
6 from Oracle and the version from Android. They are right here.

7 (Document displayed)

8 The Oracle overview for the term "KeyPair" is on the  
9 left, and the Android version for "KeyPair" is on the right.

10 Now, on the left we see 12 words, including the words  
11 "reference," "component" and "pair." On the right we see four  
12 simple words, "Returns the private key."

13 Those aren't even substantially similar. I was  
14 pointing out that Dr. Mitchell had failed to meet the  
15 substantial similarity test. I mean, he didn't even get to bat  
16 on virtual identity. I mean, come on. That's crazy.

17 Look at the next one.

18 (Document displayed)

19 They showed Bob Lee one or two examples. Are you  
20 telling me that these are virtually identical? Sure, they use  
21 a lot of the same words, but that's the whole point. You're  
22 describing something that's well known as a technical thing.  
23 These aren't virtually identical. They are probably not even  
24 substantially similar. And that's all you saw, a couple  
25 examples for Lee and one example with -- that I brought out

1 from Mitchell. And they already told you there's 11,000 pages  
2 of this. And is that -- presumably they went out and picked  
3 their best examples.

4 So I don't think that you should need much time on  
5 verdict question two. That's a "No." That's just a massive  
6 failure of proof all way around on the User's Manual.

7 Okay. Question three. Now we're going into nine  
8 lines of code. Josh Bloch. Let me pause a minute and remind  
9 you of what Dr. Bloch testified about. First of all, he was  
10 never part of the Android team. Android launched in '07. He  
11 wasn't on the team. The first handsets came out, as you  
12 remember, in '08. And Josh Bloch didn't join the team til  
13 sometime after '09. He had been at Sun and he had written a  
14 file there called java.arrays. It's a file of 3,000 lines of  
15 code.

16 When he got to Google, before he got on the Android  
17 team, he wrote -- he rewrote that file and he called it  
18 TimSort. And, remember, he gave TimSort to Sun to be part of  
19 the Java project. He gave it to them originally. That's where  
20 it came from. And within it were nine lines of code called  
21 rangeCheck, which he said a high school programmer could write.  
22 And they went along with it to Sun, and Sun had it. Sun was  
23 using it and they put it in Java and they said, "This is really  
24 great. It's a great program, Josh. Wonderful."

25 Well, unfortunately, Josh made a mistake, which he

1 apologized for right here in front of you. I'm not sure he had  
2 to do that. You're going to drag somebody in here over nine  
3 lines of code? Okay. But he put that TimSort file in Android  
4 and that file had the nine lines of code that had been in one  
5 of the Sun files, and that was unfortunate. We've taken it  
6 out. It's been taken out of all current versions, all current  
7 versions of Android. You can find it, if you go back through  
8 history. It hasn't been ripped out of every file in the past,  
9 but the current versions have all removed it. And it is  
10 inconsequential. It's trivial.

11           You'll get an instruction from Judge Alsup about  
12 diminimus and what's diminimus. You look at quantity. You  
13 look at quality. Josh Bloch has testified that he's the author  
14 of it. It's a simple piece of code. It's a short piece of  
15 code. It is not a big deal whatsoever.

16           Let's actually skip forward two slides to show the --  
17 this one.

18           (Document displayed)

19           Okay. Nine lines of code in 3,109 [sic] of code in  
20 the relevant Java file. That is the definition of diminimus.

21           Now, let's go back for just a minute to the previous  
22 one.

23           (Document displayed)

24           The other testimony you have is on the other 10  
25 files, okay? The first two are files where the source code



1 comments are involved. These came from Noser, not from Google  
2 engineers. Remember, Noser signed a contract agreeing not to  
3 use anything that wasn't open source, but these two files came.  
4 And the source code comments are not compiled. They are not  
5 compiled into the code. They never make it on a handset.

6 These Impl test files, there's also no evidence that  
7 they ever made it on a handset either. No testimony to that  
8 effect. Mitchell said he didn't know. He couldn't demonstrate  
9 it.

10 The only files that made it onto a handset are  
11 TimSort and those are the files that Josh Bloch created, as he  
12 testified. And they are clearly diminimus and that's why we're  
13 asking for a "No" vote on the line-by-line source code.

14 This is the only place in the verdict form where  
15 you're being asked to evaluate line-by-line copying. That's  
16 it. Line-by-line copying.

17 And, remember, they scoured the whole platform. Dr.  
18 Mitchell said: I used Dr. Visnick's work and his computer  
19 tool. It did a literal match. We checked all the lines. Then  
20 we checked parts of the lines. Then we checked some words  
21 within the lines, and what we came up with were the nine lines  
22 of code.

23 Okay. Let's go on to the next one.

24 (Document displayed)

25 We have one more verdict question, which is kind of

1 like extra credit. This is sort of an extra credit question.  
2 That's a pretty simple question, too.

3 The question here is:

4 "Has Google proven that Sun and/or Oracle  
5 engaged in conduct that Sun and Oracle knew  
6 or should have known would reasonably lead  
7 Google to believe that it would not need a  
8 license."

9 Okay. This is the pattern of conduct, words and  
10 statements, led by Mr. Schwartz, but engaged in by others at  
11 Sun throughout the period of time after Android was launched.  
12 All we're talking about is what happened after Sun -- after Sun  
13 knew that Android was launched.

14 First point is, that it was never a secret to Sun  
15 what Android was doing.

16 Let's look at the next slide.

17 (Document displayed)

18 From the very beginning in the negotiations between  
19 the parties -- this is Trial Exhibit 617. It's one of the  
20 communications between Mr. Rubin and Mr. Cizek in the fall of  
21 '05.

22 Again, none of these mention APIs. None of these  
23 mention any of that, but it's crystal clear that Google is  
24 using the Java Language and the guys at Sun know that when  
25 you're using the Java Language you're using the Java APIs, too.

1 He says:

2 "If Sun doesn't want to partner with us to  
3 support the initiative, we are fine releasing  
4 our work and not calling it Java."

5 That was what he understood was the order of the day.  
6 If I'm not going to take the brand and the coffee cup, I'm not  
7 going to call it Java, then I'm fine. That's what he said  
8 point blank.

9 Now, the release is a big deal. Google makes a big  
10 deal out of Android's release in November of '07. And right  
11 around that time, before there's anything public, before  
12 there's a big blog post or anything like that, Schwartz writes  
13 to Schmidt confidentially on this next email.

14 (Document displayed)

15 This is a confidential CEO-to-CEO communication  
16 between Schmidt and Schwartz after Android is known.

17 And you heard Schwartz testify: I knew. I knew that  
18 the APIs would be in there and that they were using the Java  
19 Language. That was clear to me.

20 "Let us know how we can help support your  
21 announcements next week. We're happy to do  
22 so."

23 "We're happy to do so."

24 And then what? Then we've got this on the website.

25 (Document displayed)

1 Now, Mr. Schwartz, who was running the company,  
2 testified:

3 "I considered my statements on this website  
4 to be the corporate policy of Sun. This was  
5 hosted on a Sun website. It was corporate  
6 policy. That's what I -- I wanted to  
7 communicate with customers, with competitors,  
8 with the market.

9 "Instead of holding a press conference," he  
10 said, "I communicate on this blog."

11 And he was the CEO at the time.

12 Now, there's two key points here; not just the rocket  
13 and we strapped here another of rockets, but look at the second  
14 bullet.

15 "We're going to commit resources to Android.  
16 We've honestly done a ton of work to support  
17 developers on all Java-based platforms and  
18 we're pleased to add Google's Android to the  
19 list."

20 That means a lot more than just congratulations and  
21 welcome. That means, we, Sun, are going to commit to  
22 supporting Android by helping make some of our products  
23 available for people to use with Android. That's what this  
24 NetBeans developer product is all about.

25 And so it's not just the rocket.

1 (Document displayed)

2 It's the fact that they were going to commit  
3 resources. Everybody had the rocket anyway. There it goes.  
4 We strapped the rocket to Java. You knew that was coming. You  
5 knew that was coming.

6 (Laughter.)

7 And the whole point of that was that Mr. Schwartz  
8 determined, and the guys at Sun determined -- and I'm sure  
9 Mr. McNealy wasn't in the dark, I mean, he was there, too --  
10 that Android would be a good thing, not a bad thing for Java  
11 and it's turned out to be the case. Java profits are up at  
12 Oracle. More people are using the language. More people are  
13 writing code in Java because of Android.

14 Now, what else happened? After the rockets, after  
15 committing resources, there is this meeting.

16 (Document displayed)

17 You saw this earlier. The meeting between Schmidt  
18 and Schwartz. They are meeting privately. It's a personal  
19 meeting and the subject of it is Android. Schwartz didn't  
20 complain. Schwartz didn't say, "This is wrong." Schwartz  
21 didn't say, "You need a license." Schwartz didn't, "You're  
22 ripping me off." Schwartz didn't say, "This is copyright  
23 infringement." Schwartz said, "How can we benefit from  
24 Android? Can we use it, too?"

25 Come on. If that isn't an affirmative endorsement of

1 a product, I don't know what is. And he wasn't out in public.  
2 He was in a private personal meet with Schmidt. And Schmidt  
3 came away from that meeting with the impression that we had  
4 steered clear.

5 (Document displayed)

6 This is what he said.

7 "We had steered clear of their intellectual  
8 property."

9 And who wouldn't? Who wouldn't? If you're sitting  
10 down in a meeting where no one else is present and these guys  
11 can say anything they want to one another, anything in the  
12 world. There's nobody there to watch.

13 And Schwartz doesn't dispute that. Schwartz got this  
14 email and even then went ahead with Schmidt's permission, which  
15 he didn't need in the first place because Android is an open  
16 platform, and put JavaFX on Android.

17 I'm not going to play the video again, but you get  
18 the point. They weren't saying, "It's wrong." "It's bad."  
19 "You've stolen." They're saying, "How can we benefit from  
20 Android, too? It's open source. It's out there. We want to  
21 use it."

22 And then there is Mr. Ellison, who came in here, I  
23 think, hoping to say, "I can take the Java language back." "I  
24 can take the Java Language back." My first question to him  
25 was, "Isn't the Java programming language free for anyone to

1 use?" He couldn't answer. He couldn't answer it. "I don't  
2 know." "I don't know." He said point blank, point blank in  
3 his deposition, "It's free for anyone to use."

4 And what did he do when he acquired -- when Oracle  
5 acquired Sun? Almost the very first thing he did; two things.

6 One, let's billed a Java Phone. Project Java Phone.

7 And, two, he went on stage with his friend McNealy at  
8 JavaOne in 2008 -- excuse me, 2009, after they acquired the  
9 company, and said:

10 "We're excited. Android is using Java.

11 We're flattered. And I think we can see lots

12 and lots of Java devices, some coming from

13 our friends at Google."

14 Come on. If that isn't an affirmative endorsement of  
15 something, I'm not sure what else there would be.

16 What's the reliance? The reliance is simple, and you  
17 heard it from Rubin. They were told in '07: Welcome to the  
18 party. We're happy to have you in the Java Community.

19 They kept on going without looking at any other  
20 alternatives. Nobody looked at an alternative to Java in '07.  
21 Because in '08, that was at JavaOne, Sun said, "We'd like to  
22 use FX on Java, on Android." Then they launched a phone. Then  
23 they helped HTC launch a phone. Then they helped Samsung  
24 launch a phone. Motorola launch a phone.

25 And you heard from Mr. Rubin. All these things

1 require effort and money and time. He increased the size of  
2 the Android team. He increased the money they were putting  
3 into Android. He never looked to see another alternative  
4 because, according to Mr. Schwartz and Mr. Gupta -- remember  
5 the meeting at which Mr. Gupta came to Google and met with  
6 Rubin and said, "Congratulations. It looks like Android is  
7 pretty great. We'd like to build a product of our own."  
8 That's JavaFX. He came to show that off.

9           And so the point of question 4-B is: Did Google  
10 rely? You bet they did. We haven't totaled up the money, but  
11 that doesn't matter. You heard the testimony from Rubin about  
12 all the steps they took and all the support they gave and all  
13 the work they did after Sun said, "You are welcome to be in the  
14 Java family and the Java Community."

15           So the evidence supports a verdict for Google on  
16 every single question on the form that you're about to start  
17 filling out after we're done. And maybe the best evidence of  
18 that is what the folks at Sun did and thought at the time. And  
19 Mr. Schwartz told you in point blank terms that he was the one  
20 that put APIs out in the public, and used them to promote the  
21 language, and used them to promote the widespread adoption of  
22 Java, and used them for Sun to make money, and used them as  
23 part of the basic Sun business plan. So he is the one in the  
24 best position to judge what's happening. And his judgment was  
25 given in this courtroom on Thursday. And that judgment was,



1 "We didn't have grounds to sue." And he is the one person that  
2 knew everything that was to know about what Android was, what  
3 it had in it, what it was using, and why it was -- why it was  
4 there.

5 And so based on all of this, two things are  
6 definitely true. They haven't met the burden to prove  
7 copyright infringement in the first place, because Android is  
8 not a copy of the Java 5.0 copyrighted work. It is not. It is  
9 a substantially different work with 100 percent different  
10 source code, with a different platform, different  
11 functionality, and different success in the market, as you now  
12 know.

13 And the other thing that's true is the evidence makes  
14 clear as a bell that this kind of use of APIs in this way,  
15 where you use the minimum you need to be compatible, is a fair  
16 use. When you're using it to foster innovation, competition.  
17 When you're making it available on an open platform that  
18 everyone can compete on, you are fostering the kinds of values  
19 that fair use was intended to promote. And we all know in  
20 northern California that is absolutely critical to our future  
21 and our prosperity.

22 Now, I have to ask one more favor before I sit down,  
23 and that's because I don't get a chance to talk again. Many of  
24 you will find that a relief.

25 (Laughter.)

1 But I don't, because I know I've forgotten something  
2 and I know I've left something out. And I know there is  
3 something that Mr. Jacobs is going to say that maybe I didn't  
4 cover. And so I'm going to ask you guys who have heard the  
5 evidence and heard our witnesses and seen our exhibits to think  
6 about, what is it that Google would say? What would Google say  
7 in response to that argument?

8 You've heard enough to know that I would have a  
9 response and I think you've heard enough to know what that  
10 response would be.

11 And so, again, on behalf of Google, I thank you for  
12 your time and attention and good luck in your deliberations.

13 **THE COURT:** Thank you, Mr. Van Nest.

14 Let's take our next 15-minute break now and then at  
15 the end of the next session, the case will go to you for  
16 decision. But not yet.

17 Please, don't talk about the case during the break  
18 and we'll see you back here in 15 minutes.

19 (Jury exits courtroom at 10:49 a.m.)

20 **THE COURT:** Please be seated.

21 Any issues for the Court?

22 **MR. JACOBS:** None from us, your Honor.

23 **MR. VAN NEST:** No, your Honor.

24 **THE COURT:** All right. You may use the next 15  
25 minutes to set up.

1 Mr. Jacobs, are you giving the final final?

2 **MR. JACOBS:** Yes, sir.

3 **THE COURT:** You have 25 minute.

4 **MR. JACOBS:** Thank you very much.

5 (Whereupon there was a recess in the proceedings  
6 from 10:49 until 11:07 a.m.)

7 **THE COURT:** All right. Please have a seat. Thank  
8 you. Let's go back to work.

9 May we bring in the jury?

10 **MR. JACOBS:** Yes, Your Honor.

11 **THE COURT:** Dawn, may we do that.

12 (Jury enters at 11:09 a.m.)

13 **THE COURT:** So, welcome back. Please be seated.

14 Every one over there ready? Good.

15 Mr. Jacobs, the floor is yours.

16 **REBUTTAL ARGUMENT**

17 **MR. JACOBS:** Let's start with the instructions you're  
18 going to get on structure, sequence and organization.

19 The implication of Google's argument to you is that  
20 this is something off to the side; it's not really what is  
21 protected by copyright; and the fact that their structure,  
22 sequence and organization is identical is dwarfed by the number  
23 of lines of code that are different.

24 But if we look closely at the instructions, we have a  
25 very specific and direct answer to that question.

1           So let's look at Instruction No. 17.

2           Now, if you were listening carefully, you heard  
3 Google's counsel say that the Application Programming  
4 Interfaces are a system -- he was trying to put it into a  
5 bucket that you'll see in the instruction about limitations on  
6 the scope of copyright, because copyright doesn't protect a  
7 system.

8           So if we look at the bottom paragraph here, we see  
9 that there's a limitation that systems are not protectable.

10           But then in the last time -- in the last line, your  
11 instructions will read:

12           "I instruct that the copyrights in question  
13 do cover the structure, sequence and  
14 organization of the compilable code."

15           And that's what we started calling the SSO of the  
16 code, the structure, sequence and organization of the  
17 compilable code.

18           And then if we look at Instruction 19, we read in  
19 line 22 -- sorry. Can I have the Elmo for a second.

20           We read in Instruction 19 that Google agrees that the  
21 structure, sequence and organization of the 37 accused API  
22 packages in Android is substantially the same as the structure,  
23 sequence and organization of the corresponding 37 API packages.

24           And then in Instruction 20 we will learn that while  
25 individual names are not protectable on a standalone basis,

1 names must necessarily be used as part of the structure,  
2 sequence and organization, and are, to that extent, protectable  
3 by copyright.

4           What Google is saying to you is throw all that out,  
5 this structure, sequence and organization; nobody has ever  
6 heard of that before.

7           This is the law for this case, that the structure,  
8 sequence and organization is protectable. And this is not  
9 something trivial or insubstantial in this case.

10           So let's put up the java.nio slide. And I would  
11 actually -- I wish I had Google's counsel's attempt to convert  
12 this slide into the file cabinet analogy, because it got pretty  
13 complicated with lots and lots of files.

14           And then Google's counsel had to stop, in talking  
15 about the interrelationships and the hierarchies and  
16 interdependencies because it would have started to look like a  
17 spider web.

18           Now, what the instructions are saying when they say  
19 the structure, sequence and organization is protectable, this  
20 structure is what is protectable. None of this is implementing  
21 code. All of this is Application Program Interface elements.  
22 And you know that from the testimony of all the experts and all  
23 of the developers. This is the structure, sequence and  
24 organization.

25           So let's -- let's take Google's counsel's analogy one

1 step further. What is Google saying when they say this is not  
2 substantial, this NIO is not substantial, all the implementing  
3 code is what matters?

4 What they're saying is, imagine you actually had a  
5 filing system with all the cross-references and  
6 interrelationships that are on this slide. What you should  
7 count are the number of pieces of paper in the files because we  
8 put, we, Google, put the pieces of paper in the files on our  
9 own; we wrote the code, the implementing code on our own.  
10 Forget that the judge is telling you that the whole filing  
11 system, the whole structure, sequence and organization, is  
12 protectable; count the folders as if they're just another piece  
13 of paper.

14 But that completely misses the forest for the trees  
15 or the structure, sequence and organization for the pieces of  
16 paper.

17 So when Google says to you, Our code is entirely  
18 different, what they're saying is the pieces of paper are  
19 different.

20 But, of course, the pieces of paper are organized,  
21 structured and sequenced in exactly the same way, with exactly  
22 the same kinds of paper, in exactly the same file in this now  
23 huge, gimongous filing system that gets created. And this is  
24 just one package. Java.nio is just one package.

25 So the instructions tell us that this is protectable

1 material. The testimony tells you that this is the important  
2 material because this is what Android developers decided to  
3 take in order to offer this kind of what's in developers' heads  
4 sort of benefit and get on the market more quickly.

5 Now, there's one very important additional  
6 instruction that we haven't focused on, and that's 28. And the  
7 last sentence of instruction 28 is very important.

8 It tells you that, in essence, that an infringer does  
9 not escape liability by adding new material of the infringer's.

10 We know this has to be common sense. If the  
11 infringer takes one half of my song and adds material -- and  
12 adds five songs to it and puts it on an album, of course, the  
13 infringer didn't escape liability for infringing half of my  
14 song and adding five and a half of his own.

15 And so what this instruction says, if an infringing  
16 excerpt is copied from a book, it is not excused from  
17 infringement merely because the infringer includes the excerpt  
18 in a much larger work of its own.

19 And that is what Google's counsel is trying to argue  
20 to you: We wrote all this additional material ourselves. We  
21 wrote this implementing code ourselves. Ignore that we took  
22 the protected structure, sequence and organization.

23 That is not the law. It's not the law generally.  
24 it's not the law for this case. You should reject Google's  
25 argument.

1           Now, I want, also, just to remind you of the  
2 testimony of Google's expert on similarity, because there was a  
3 claim by Google's counsel that we didn't show copying.

4           What Google's expert told you, in the material I had  
5 a few minutes ago, is that it's word-for-word, symbol-by-symbol  
6 identical.

7           And so if we go to closing slide 6.

8           Now, recall that this is -- that what the expert is  
9 answering here is Google's counsel's question about  
10 differences. And so Google's counsel says -- he asks it, are  
11 there any similarities, hoping that he is going to get an  
12 answer from his own expert about all the differences. And,  
13 instead, what his own expert says is:

14                 "The package names, class names, and method  
15 names for the 37 packages are the same."

16           And then he points out:

17                 "The structure of the names of the classes,  
18 packages and methods needs to be the same."

19           It had to be the same. There was no question of  
20 copying here. It's all a question of excuses.

21           So when you look at the structure, sequence and  
22 organization, keep in mind that this is the essence of what an  
23 architect of software does. These are the blueprints for the  
24 core libraries. They tell the core library implementer what  
25 the structure is, what needs to go in, what needs to go out.



1 Implementation you saw on the posters. Coders can  
2 implement. But API designers, that's the creative, that's the  
3 heavy-lifting part of writing an effective software package.

4 Let me address, next, the question of damaging --  
5 whether there's damage here, whether there's harm here. This  
6 comes up in the fair use factors.

7 I think it would be pretty obvious, again, just very  
8 simple terms, if somebody takes my intellectual property and  
9 puts it in his own product and gives it away for free, the harm  
10 is pretty obvious. Took my IP. Gave it away for free to  
11 somebody else.

12 But there's real hard evidence in the e-mails of the  
13 threat that Sun, and now Oracle, is concerned with and was  
14 concerned with. Let's take a look at Exhibit 205.

15 Now, recall the players here. This is Scott McNealy,  
16 who you heard testify. He's the chairman of Sun at this point.  
17 Jonathan Schwartz is the CEO. Jonathan Schwartz reports to  
18 Scott McNealy as the chairman of the board.

19 The board of Sun is who is in charge. Not the CEO.  
20 The CEO is accountable to the board. And Scott McNealy is  
21 writing to Eric Schmidt and copying Jonathan Schwartz. And he  
22 says, in responding to this business proposal for collaboration  
23 on Android:

24 "I'm worried about how we're going to replace  
25 the revenue this is likely going to

1 submarine. I'm supportive of driving a  
2 completely open stack, but I just need to  
3 understand the economics."

4 And he testified, needing to understand the  
5 economics, that means you've really got to show me how we're  
6 not just going to take a bath here, because you're going to be  
7 giving this away for free and we have a licensing model.

8 So at the very top of the company Sun was concerned  
9 about how Android would affect its revenues.

10 And on fragmentation, let's look at one of Google's  
11 favorite exhibits. Let's take a look at page -- at Exhibit --  
12 I think it's Exhibit 147.

13 I'm sorry. It's slide 147, Mr. Lee.

14 Let's go to exhibit -- oh, there we are. Great.

15 Now, this is a portion of the compatibility is  
16 optional presentation that Google's counsel showed you. And  
17 this is -- on the front part there was a debate going on at  
18 Sun, How do we deal with compatibility going forward, because  
19 we do have these open source models ourselves under the GPL.

20 But this very presentation reminds the reader that  
21 here is the state of play before we change our policy. And it  
22 says:

23 "For independent implementation our  
24 specification licenses grant IP rights only  
25 for implementations that satisfy the

1 compatibility requirements."

2 And the debate at Sun was whether to continue to  
3 enforce that. But they did continue to enforce that. And they  
4 continued to enforce the restrictions on Apache, as well.

5 Now, this Apache issue, it continues to pop up even  
6 though it seems like it's been well established that Apache  
7 doesn't give -- doesn't give Google any rights.

8 You're going to see an instruction that says that  
9 for -- that unless a third party has permission from a  
10 licensor -- here from Sun or Oracle -- that you don't get any  
11 benefit from the third party. This will be Instruction No. 30.

12 And Instruction No. 30, starting at around line 23 --  
13 or 21:

14 "... Google had no right to copy any elements  
15 of the Java platform protected by copyright  
16 unless it had a written license to do so from  
17 Sun or Oracle, or had a written sub-license  
18 from a third party who had a license from Sun  
19 or Oracle conferring the right to grant such  
20 sub-licenses.

21 "The burden would be on Google to prove it  
22 had any such express license or sublicense  
23 rights. But in this trial it makes no such  
24 contention."

25 So what this instruction is saying is that unless

1 Apache had a license from Sun, the fact that Google took from  
2 Apache is legally irrelevant.

3 And you heard that from witness after witness in this  
4 trial, who said on the Google side, no, no, no, we're not  
5 claiming any license rights from Apache.

6 So the first question about Apache is, does it give  
7 Google any affirmative grant? Does it constitute a license  
8 from Sun through Apache to Google? And the answer is no.

9 But there's much, much more we can learn about the  
10 whole Apache debate. Let's go to Exhibit 1045, please.

11 You'll recall this exhibit. This is the exhibit in  
12 which Apache says, we give up. We're not going to argue about  
13 this anymore.

14 You'll recall the testimony that Apache Harmony goes  
15 in the attic, which means that it's kind of retired from any  
16 further work. And you'll recall that this was accomplished  
17 without litigation. Oracle negotiated with the other players  
18 in the industry, such as IBM, and they agreed to collaborate,  
19 instead, with Oracle on Oracle's GPL version of Java OpenJDK.

20 But along the way, Apache said very interesting and  
21 important things that are completely inconsistent with what  
22 Google has told you. Let's go to the next page. The third  
23 paragraph up, the Apache Software Foundation.

24 Now, you'll recall the testimony, this was a bitter  
25 disagreement. There were people who were very upset with Sun

1 and later with Oracle. But they had to acknowledge Sun and  
2 Oracle's rights to say no. Just as Sun told Google no when  
3 Google wanted Sun to change its business model.

4 The Apache Software Foundation concludes that, the  
5 JCP is not an open specification process.

6 Pause there for a minute.

7 Jonathan Schwartz told you, Google's counsel cited  
8 it, that Sun made these APIs open. And you heard a lot of  
9 testimony about what "open" can mean.

10 And you heard Scott McNealy say, open does not mean  
11 throw it over the transom and give it to someone else with all  
12 rights of ownership.

13 Open can mean lots of things. And here what open  
14 means is that you can implement these specifications under a  
15 specification license, so long as you are fully compatible.  
16 But Sun has a veto.

17 They are published. They are on the website. They  
18 are open in that sense. But they are still copyrighted.

19 The Apache Software Foundation concludes that the JCP  
20 is not an open spec process. The Java specifications are  
21 proprietary technology that must be licensed directly from the  
22 spec lead under whatever terms the spec lead chooses. That the  
23 commercial concerns of a single entity, Oracle, will continue  
24 to seriously interfere. So they are not happy with this.

25 But they say it is impossible to distribute

1 independent implementations of JSRs -- you remember what those  
2 are -- under open source licenses such that users are protected  
3 from IP litigation from the spec lead.

4           These are proprietary specifications. Even though  
5 Sun made them open in one sense, they are proprietary in  
6 another sense. And Sun gets to say who they license to.

7           And that brings me to the exhibit I suggested you  
8 keep in mind an hour and a half or so ago, and that's Exhibit  
9 18.

10           So recall Exhibit 18. This is a back and forth in  
11 which one of Andy Rubin's colleagues tells him that somebody  
12 else has come up with an independent implementation of the Java  
13 specifications and they're not going to -- they don't need the  
14 brand --

15           **MR. VAN NEST:** Excuse me, Your Honor. I think this  
16 is outside the scope of the argument.

17           **THE COURT:** No. Overruled. Please continue.

18           **MR. JACOBS:** And Andy Rubin writes, right in the  
19 middle of the e-mail:

20           "Wish them luck. The Java.lang APIs are  
21 copyrighted. Sun gets to say who they  
22 license the TCK to."

23           So in the absence of an agreement from Sun, you  
24 cannot go off and claim you're making this independent  
25 implementation and you don't have to take a license.

1           That was Andy Rubin in 2006. Very different from  
2 what Google's counsel is arguing to you today.

3           That was the Apache Software Foundation a minute ago,  
4 in 2010. Very different from what Google's counsel is arguing  
5 with you today.

6           And that brings me, finally, to the specification  
7 license, which is the license that Android is most directly in  
8 conflict with, and in which Google's fair use argument most  
9 seriously disrupts.

10           The specification license, you heard it discussed at  
11 some length by Thomas Kurian. The specification license has  
12 several requirements.

13           It requires that you not superset and subset. It  
14 requires, in effect, that you have a clean room, because it  
15 must be an independent implementation. And it requires that  
16 you fully implement the specification, including all of its  
17 required interfaces and functionality.

18           So let's just hit the i, ii, and iii in that  
19 paragraph. So note in the beginning that:

20           "Under this license Sun grants you a license  
21 under copyrights or patent rights if you  
22 fully implement the spec."

23           Now, recall that Android doesn't do that. So if  
24 Android can get away -- if Google can get away with a partial  
25 implementation of the specification and not be forced -- it was

1 a fascinating interchange with Jonathan Schwartz. You may  
2 recall this. I said, What's the GPL? It's give and get back.  
3 He said the GPL is give and force back. You force back with  
4 copyright.

5 And here, in this spec license, this -- the  
6 enforcement of copyrights is how Oracle enforces compliance  
7 with this license, enforces Java compatibility. And so you  
8 have to fully implement the spec. You can't superset, subset.  
9 You can't pick and choose from the Java APIs the way Android  
10 did. That's ii.

11 And then, of course, you have to pass the TCK. And  
12 Android never did that. And all of those are interrelated.  
13 All of them designed to preserve "write once, run anywhere."

14 And Google would destroy Oracle's ability to enforce  
15 the terms of the specification license if Google's fair use  
16 argument were adopted.

17 So is there harm to Oracle? Revenues are increasing.  
18 But you heard how the revenues are increasing. This is --  
19 Oracle is a very well-managed company. And they have figured  
20 out places to deploy Java in devices and in cards and in things  
21 where Android is not yet present.

22 But on the smart phone, where there is a big  
23 opportunity, it's very difficult to compete with free.  
24 Impossible. I don't know how one would compete with free.

25 And so when Google says, How are we harming Java when



1 Java revenues are increasing, they are not discussing and not  
2 explaining the missed opportunities for Java.

3 And, of course, they can't explain because they would  
4 destroy it, the effect on Oracle's efforts to license Java in a  
5 compatible and a consistent way. And, yes, even to address  
6 some of the fragmentation issues that arose in the future.

7 You heard about those plans from the Oracle  
8 developers. There is a new sheriff in town. Java compliance  
9 and consistency is being improved. There is more investment in  
10 Java. There are greater resources being developed. The  
11 layoffs have stopped.

12 We need the help of the justice system to enforce our  
13 intellectual property rights so that investment is not for  
14 naught.

15 Again, thank you very much for your attention.

16 **FINAL JURY INSTRUCTIONS**

17 **THE COURT:** Thank you, Mr. Jacobs.

18 I'm about to start reading the instructions. And I  
19 am sure there are members of the public who would like to  
20 excuse themselves, because once we start, I don't want you to  
21 distract us by coming and going. So, please, take this  
22 opportunity, if you would like, to excuse yourselves.

23 While the members of the public are excusing  
24 themselves, one thing I think I can safely say to you is, I am  
25 going to read these instructions, and there are very slight

1 editing changes that I have made, also, on the verdict form,  
2 but from what you saw with counsel. But it's not their fault.  
3 They worked with the most recent draft, which I told them was  
4 final. But I've edited it very slightly since then.

5 So if you see some difference from what the lawyers  
6 showed you, it's inconsequential, and it's only for editing  
7 purposes. And that discrepancy is my fault and not the fault  
8 of the lawyers.

9 All right. So everyone has left that wants to leave.  
10 Great.

11 So just to give you a heads up, this will take,  
12 probably, 45 minutes to go through.

13 You know, most of us went to law school for three  
14 years. You get to go to law school for 45 minutes.

15 (Laughter)

16 **THE COURT:** But you do get this huge benefit, and  
17 that is that we have worked hard to summarize for you what the  
18 relevant law is so that you don't have to learn three years'  
19 worth. You get to learn the part that bears directly on this  
20 case.

21 And we have worked hard to put this in the clearest  
22 terms we can so that you will understand it.

23 The part of the case that is completely in your  
24 discretion is the fact part. You know, the "what happened"  
25 part.

1 But the part that you are duty bound to follow is the  
2 law part as I give it to you, because it's my job to tell you  
3 what the law is, and it's your job, having sworn to do so, to  
4 follow the law in reaching your decision.

5 So, I am going to pick up where I left off, but I  
6 will repeat the last short paragraph for context, and then  
7 we'll continue on.

8 You will remember that I had said this: On any  
9 claim, if you find that plaintiff carried its burden of proof  
10 as to each element of a particular claim, your verdict should  
11 be for plaintiff on that claim.

12 If you find that plaintiff did not carry its burden  
13 of proof as to each element, you must find against plaintiff on  
14 that claim. The same principle also applies to defendants on  
15 claims or defenses for which it has the burden of proof.

16 That's the paragraph I read before. And you will  
17 remember, from having seen the Special Verdict Form, that it  
18 just tells you flat out who has the burden of proof. It says  
19 "Has Oracle proven," or, as the case may be, "Has Google  
20 proven." So it will be very clear to you in the special  
21 verdict form who has the burden of proof.

22 Continuing:

23 I will now turn to the law that applies to this case.  
24 Oracle seeks relief against Google for alleged copyright  
25 infringement. Google denies infringing any such copyrighted

1 material and asserts that any use by it of copyrighted material  
2 was protected, among other things, by a defense called "fair  
3 use," which will be explained below. If you find liability in  
4 this phase, we will consider the extent of damages in the third  
5 phase of the trial.

6 Now, I will give you an overview of copyright law in  
7 general. Then I will give you a summary of the claims and  
8 defenses at issue in this case. After that I will give you a  
9 further statement of copyright law to help you in resolving the  
10 claims and defenses.

11 By federal statute, copyright includes exclusive  
12 rights to copy a work, rights that last for 95 years from the  
13 date of publication. The rights include the exclusive rights  
14 to:

15 Make additional copies or otherwise reproduce the  
16 copyrighted work or to license others to do so; recast,  
17 transform, or adapt the work, that is, prepare derivative works  
18 based on the copyrighted work; distribute copies of the  
19 copyrighted work to the public by sale; and display publicly a  
20 copyrighted work.

21 It is the owner of the copyright who may exercise  
22 these exclusive rights to copy. Even though someone may  
23 acquire a copy of the copyrighted work, such as a book from a  
24 bookstore, for example, the copyright owner retains rights to  
25 control the making of copies of the work.

1 Copyright automatically exists in a work the moment  
2 it is fixed in any tangible medium of expression, such as  
3 putting pen to paper. The owner of the copyright may then  
4 register the copyright by delivering to the Copyright Office in  
5 the Library of Congress a copy of the copyrighted work and  
6 applying via a registration form, after which the Copyright  
7 Office will either allow or disallow the application.

8 By way of examples, copyrighted works can include  
9 literary works like books, periodicals and, of particular  
10 interest here, operating manuals; 2, musical works; 3,  
11 photographs and drawings; 4 motion pictures; 5, computer  
12 programs, also of particular interest here.

13 Only that part of the work comprised of original  
14 works of authorship fixed in any tangible medium of expression  
15 from which it can be perceived, reproduced or otherwise  
16 communicated, either directly or with the aid of a machine or  
17 device can be protected by copyright. To take examples, words  
18 can be fixed on paper, and a computer program can be fixed in  
19 the memory of a mobile phone.

20 As stated, the owner of a copyright has the exclusive  
21 right to make copies of all or more than a de minimus part of  
22 the copyrighted work, subject only to the right of anyone to  
23 make fair use of all or a part of any copyrighted material, all  
24 as will be explained below.

25 The copyright confers ownership over the particular

1 expression of ideas -- expression of ideas -- in a work, but it  
2 never confers ownership over ideas themselves.

3           For example, if a book describes a strategy for  
4 playing a card game, the copyright prevents anyone but the  
5 owner from duplicating the book itself, but everyone is still  
6 free to read the book and to use the strategy, for the idea set  
7 forth in the book, that is the strategy, is not protected by  
8 copyright. And, everyone is entitled to write their own book  
9 about the same game and the same strategy so long as they do  
10 not plagiarize the earlier work -- the earlier book. Again,  
11 the main point is that copyright protects the particular  
12 expression composed by the author.

13           Another statutory limitation on the scope of a  
14 copyright is that copyright never protects any procedure,  
15 process, system, method of operation, concept, principle, or  
16 discovery. Possibly such things can be claimed under the  
17 patent system or by trade secret laws but they may not be  
18 claimed by copyright. For purposes of your deliberations,  
19 however, I instruct you that the copyrights in question do  
20 cover the structure, sequence and organization of the  
21 compilable code.

22           I'm going to repeat that because it's been alluded to  
23 by both sides. For purposes of your deliberations, however, I  
24 instruct you that the copyrights in question do cover the  
25 structure, sequence and organization of the compilable code.

1 I will now turn to the claims in this case. Oracle  
2 claims Google has infringed its copyrights in two registered  
3 works, namely, quote, Java 2, Standard Edition, Version 1.4,  
4 closed quote, Trial Exhibit 464 and, quote, Java 2, Standard  
5 Edition, Version 5.0, closed quote, Trial Exhibit 475, and the  
6 applications leading to those registrations appear at Trial  
7 Exhibits 3529 and 3530.

8 Among other things, the registered copyrights  
9 generally include the compilable code and documentation for the  
10 Java API packages. The main issues you must decide concern  
11 these two general types of material contained therein, namely  
12 "compilable code" and "documentation."

13 As used in these instructions and the Special Verdict  
14 Form, the term API, quote, compilable code, closed quote,  
15 refers to method names and class names, declarations,  
16 definitions, parameters, organization, and implementation  
17 (whether in the form of source code or object code)  
18 implementing the various API functions.

19 The "compilable code" does not include the  
20 English-language comments you have heard about. I will repeat  
21 that sentence. The compilable code does not include the  
22 English-language comments you have heard about. Even though  
23 such comments are embedded in the software program, these  
24 English-language comments do not get compiled and are not used  
25 by the computer to perform API functions.

1           Instead, the English-language comments are part of  
2 what I will call the API "documentation," sometimes referred to  
3 as the "specification," a term that encompasses all of the  
4 English-language comments.

5           The term "API documentation" includes all content  
6 including English-language comments as well as method names and  
7 class names, declarations, definitions, parameters, and  
8 organization - in the reference document for programmers.  
9 Again, please remember that although these English-language  
10 comments appear in the software program listing, they can be  
11 extracted for handy reference in the guides made available to  
12 programmers. So, I will be referring to the "API compilable  
13 code" and to the "API documentation."

14           The copyrighted Java platform has more than 37 API  
15 packages, and so does the accused Android platform. As for the  
16 37 API packages that overlap, Google agrees that it uses the  
17 same names and declarations but contends that its line-by-line  
18 implementations are different (with the exception of the  
19 rangeCheck lines), a contention not disputed by Oracle.  
20 Instead, Oracle contends that Google copied the structure,  
21 sequence and organization of the compilable code for the 367  
22 API packages as a group.

23           Google agrees that the structure, sequence and  
24 organization of the 37 accused API packages in Android is  
25 substantially the same as the structure, sequence and



1 organization of the corresponding 37 API packages in Java.  
2 Google states, however, that the elements it has used are not  
3 infringing and, in any event, its use was protected by a  
4 statutory rule permitting anyone to make "fair use" of  
5 copyrighted works.

6           Now, let me tell you the law about names. The  
7 copyrights do not cover the names, such as those given to  
8 files, packages, classes, and methods, because under the law,  
9 names cannot be copyrighted. This applies to the name "java"  
10 as well. Although "Java" has been registered as a trademark,  
11 there is no trademark claim in this lawsuit. The name java  
12 cannot be copyrighted, nor can any other name, whether one or  
13 two words or longer in length. While individual names are not  
14 protectable on a standalone basis, names must necessarily be  
15 used as part of the structure, sequence and organization and  
16 to -- and are to that extent protectable by copyright.

17           With respect to the API documentation, Oracle  
18 contends Google copied the English-language comments in the  
19 registered copyrighted work and moved them over to the  
20 documentation for the 37 API packages in Android. Google  
21 agrees that there are similarities in the wording but, pointing  
22 to differences as well, denies that its documentation is a  
23 copy.

24           Google further asserts that the similarities are  
25 largely the result of the fact that each API carries out the

1 same function in both systems. Google again asserts the  
2 statutory defense of fair use.

3 The issues just discussed center on the API packages.  
4 Apart from the API packages -- issues -- apart from the API  
5 issues, I will now describe a list of specific items that  
6 Oracle contends were copied verbatim by Google.

7 Specifically, Oracle contends that Google copied  
8 verbatim certain lines of compilable code, namely the  
9 rangeCheck method in two files, other source code as compiled  
10 into object code in seven "Impl.Java" files and one other file  
11 and, finally, certain English-language comments in two other  
12 files. Google responds that any verbatim copying by it was  
13 excusable under the law as "de minimus." "De minimus."

14 For purposes of this group of infringement  
15 contentions, the structure, sequence and organization is  
16 irrelevant and the comparison must be made to the work as a  
17 whole as defined in a moment.

18 Now, I will turn to the more detailed law. In order  
19 to prove infringement, Oracle must first prove that Oracle's  
20 work is original and that it is the owner of the part of the  
21 work allegedly copied. For your purposes, the parties agree  
22 that there are no issues of ownership or originality for you to  
23 decide.

24 Oracle must also prove that Google copied all or a  
25 protected part of a copyrighted work owned by Oracle and that

1 the amount of copying was more than de minimus.

2           So there are two elements Oracle must prove to carry  
3 its burden on infringement, namely copying of a protected part,  
4 and that the part copied was more than de minimus when compared  
5 to the work as a whole. These are issues for you to decide.  
6 I'll repeat that. These are issues for you to decide.

7           There are two ways to prove copying. One is by proof  
8 of direct copying, as where the copyrighted work itself is used  
9 to duplicate or restate the same words and symbols on a fresh  
10 page.

11           The second way is via circumstantial evidence by  
12 showing the accused had access to the copyrighted passages in  
13 question and that there are substantial similarities or, in  
14 certain instances, virtual identity between the copyrighted  
15 work and the accused work.

16           The virtual identity test is used when the subject  
17 under consideration is a narrow one and we would expect certain  
18 terms and phrases to be used. This is in contrast to, for  
19 example, a fictional work in which there will be a broad range  
20 of creativity, in which case it is necessary only to prove  
21 substantial similarity.

22           In this trial, you should use the substantial  
23 similarity test for all such comparisons except for those  
24 involving the API documentation, in which case you should use  
25 the virtual identity test. This is because the documentation

1 for the API packages describe narrow technical functions and it  
2 is to be expected that some of the same words and phrases would  
3 likely be used.

4 To determine whether the copyrighted work and the  
5 accused work are substantially similar, or where appropriate,  
6 virtually identical, you must compare the works as a whole. I  
7 will define the works as a whole in a moment.

8 I'm sorry. I should have said the "work" as a whole.

9 However, in comparing the works as a whole, you  
10 cannot consider similarities to the unprotectable elements of  
11 Oracle's works. I have instructed you about the protectable  
12 and unprotectable elements of Oracle's work.

13 Now, I will explain the law governing Google's  
14 defense based upon the statutory right of anyone to make "fair  
15 use" of copyrighted works.

16 Anyone may use any copyrighted work in a reasonable  
17 way under the circumstances without the consent of the  
18 copyright owner if it would advance the public interest. Such  
19 a use of a copyrighted work is called "fair use."

20 The owner of a copyright cannot prevent others from  
21 making a fair using of the owner's copyrighted work. For  
22 example, "fair use" may include use for criticism, comment,  
23 news reporting, teaching (including multiple copies for  
24 classroom use), scholarship, or research.

25 Google has the burden of proving this defense by a

1 preponderance of the evidence.

2           In determining whether the use made of the work was  
3 fair you should consider the following factors:

4           1. The purpose and character of the use, including  
5 whether such use is of a commercial nature, for nonprofit  
6 educational purposes, and whether such work is transformative  
7 (meaning whether Google's use added something new, with a  
8 further purpose or different character, altering the copied  
9 work with new expression, meaning or message). Commercial use  
10 cuts against fair use while transformative use supports fair  
11 use;

12           2. The nature of the copyrighted work, including  
13 whether the work is creative (which cuts against fair use),  
14 functional (which supports fair use), or factual (which also  
15 supports fair use);

16           3. The amount and substantiality of the portion used  
17 in relation to the copyrighted work as a whole. The greater  
18 the quantity and quality of the work taken, the less that fair  
19 use applies; and

20           4. The effect of the use upon the potential market  
21 for or value of the copyrighted work. Impairment of the  
22 copyrighted work cuts against fair use.

23           All of the factors should be weighed together to  
24 decide whether Google's use was fair use or not. It is up to  
25 you to decide how much weight to give each factor but you must

1 consider all factors. If you find that Google proved by a  
2 preponderance of the evidence that Google made fair use of  
3 Oracle's work, your verdict should be for Google on that  
4 question in the Special Verdict Form.

5           With respect to the infringement issues concerning  
6 the rangeCheck and other similar files, Google agrees that the  
7 accused lines of code and comments came from the copyrighted  
8 material, but contends that the amounts involved were so  
9 negligible as to be de minimus and thus should be excused. To  
10 be clear with respect to a different issue. The parties are in  
11 agreement that the structure, sequence and organization of the  
12 API packages is more than de minimus.

13           Copying that is considered "de minimus" is not  
14 infringing. Copying is "de minimus" only if it is so meager  
15 and fragmentary that compared to the work as a whole the  
16 average audience would not recognize the appropriation.

17           You must consider the qualitative and quantitative  
18 significance of the copied portions in relation to the work as  
19 a whole. The burden is on Oracle to prove that the copied  
20 material was more than de minimus.

21           The relevant comparison is the copied portion  
22 contrasted to the work as a whole, as drawn from the  
23 copyrighted work, not contrasted to the accused infringer's  
24 work as a whole. For example, if an infringing excerpt is  
25 copied from a book, it is not excused from infringement merely

1 because the infringer includes the excerpt in a much larger  
2 work of its own.

3 In your deliberations, you will need to make certain  
4 comparisons to the "work as a whole." It is my job to isolate  
5 and identify for you the "work as a whole." You must take my  
6 identification as controlling if and when this issue comes up  
7 in your deliberations.

8 The issue arises when (1) comparing Oracle's work and  
9 Google's work for similarity under both a substantial  
10 similarity and virtual identity standards, (2) deciding where  
11 Google copied only a de minimis amount of Oracle's work, and  
12 (3) evaluating the third factor of fair use: the amount and  
13 substan- -- substantiality of the portion used in relation to  
14 the copyrighted work as a whole.

15 Although you have seen that the copyright  
16 registrations cover a large volume of work, the entire  
17 registered work is not the work as a whole for these purposes.  
18 I'm going to repeat that sentence.

19 Although you have seen the copyrighted registrations  
20 cover a large volume of work, the entire registered work is not  
21 the work as a whole for these purposes. This may seem odd to  
22 you, so let me give you an example. An entire magazine issue  
23 may be copyrighted, but a specific article or advertisement or  
24 photograph may be the relevant work as a whole, depending on  
25 what was allegedly copied.

1           For purposes of this case, I have determined that the  
2 "work as a whole" means the following: For purposes of  
3 Question 1 in the Special Verdict Form the "work as a whole"  
4 constitutes all of the compilable code associated with all of  
5 the 166 API packages (not just the 37) in the registered work.  
6 This excludes the virtual machine.

7           Similarly, for purposes of Question 2 in the Special  
8 Verdict Form, the "work as a whole" means the contents  
9 (including names, declarations and English-language comments)  
10 of the documentation for all of the 166 API packages, again not  
11 just the 37 in the registered work.

12           For purposes of Question 3, the -- for purposes of  
13 Question 3 the "work as a whole" is the compilable code for the  
14 individual file except for the last two files listed in  
15 Question 3, in which case the "work as a whole" is the  
16 compilable code and all of the English-language comments in the  
17 same file.

18           Unless you find fair use, de minimus, or  
19 non-infringement in Google's favor, Google had no right to copy  
20 any elements of the Java platform protected by copyright unless  
21 it had a written license to do so from Sun or Oracle or had a  
22 written sub-license to do so from a third party who had a  
23 license from Sun or Oracle conferring the right to grant such  
24 sub-licenses. The burden would be on Google to prove it had  
25 any such express license or sub-license rights. But in this



1 trial it makes no such contention.

2 Put differently, if Google claims a license from a  
3 third party, Google has the burden to prove that the third  
4 party itself had the proper right and authority from Sun or  
5 Oracle as to any of the copyrights owned by Sun or Oracle and  
6 used by Google, for Google could acquire from the third party  
7 no greater right than the third party itself had in the first  
8 place.

9 Similarly, if Google contends that Oracle or Sun had  
10 dedicated elements protected by the copyright to the public  
11 domain for free and open use, the burden would be on Google to  
12 prove such a public dedication. But the parties agree that  
13 that issue is for me to decide. Me as the judge. Not for you  
14 as the jury to decide. This statement of the law regarding  
15 licenses is simply to put some of the evidence you have heard  
16 in context.

17 I wanted to stop here just to give you a heads up. I  
18 have now finished the statement of the law. I am coming to  
19 what we call the concluding instructions.

20 When you begin your deliberations, you should elect  
21 one member of your jury as the foreperson. That person will  
22 preside over the deliberations and speak for you here in court.  
23 I recommend that you select a foreperson who will be good at  
24 leading a fair and balanced discussion of the evidence and the  
25 issues.

1           You will then discuss the case with your fellow  
2 jurors to reach agreement if you can do so. Your verdict as to  
3 each claim and as -- your verdict as to each claim and as to  
4 each defense, if any, must be unanimous.

5           Each of you must decide the case for yourself, but  
6 you should do so only after you have considered all the  
7 evidence, discussed it fully with the other jurors, and  
8 listened to the views of your fellow jurors.

9           Do not be afraid to change your opinion if the  
10 discussion persuades you that you should. Do not come to a  
11 decision simply because other jurors think it is right. It is  
12 important that you attempt to reach a unanimous verdict but, of  
13 course, only if each of you can do so after having made your  
14 own conscientious decision. Do not change an honest belief  
15 about the weight and effect of the evidence simply to reach a  
16 verdict.

17           I will give you a Special Verdict Form to guide your  
18 deliberations.

19           Some of you have taken notes during the trial.  
20 Whether you took notes, you should rely on your own memory of  
21 what was said. Notes should only assist your memory. Do not  
22 be overly influenced by the notes.

23           When you go into the jury room, the clerk will bring  
24 in to you the trial exhibits received into evidence to be  
25 available for your deliberations. The clerk will also provide

1 you with an index to them.

2 As I noted before the trial began, when you retire to  
3 the jury room to deliberate, you will have with you the  
4 following:

5 All of the exhibits, as I just said, that were  
6 received into evidence. An index of the exhibits. The lawyers  
7 here, I should pause and say, in order to make it easier for  
8 you, agreed upon a stipulated index of the exhibits. So that  
9 will help you find materials. A work copy of these  
10 instructions for each of you. A work copy of the verdict form  
11 for each of you. And then, of course, an official verdict  
12 form.

13 When you recess at the end of each day, please place  
14 your work materials in the brown envelope provided and cover up  
15 any easels with your work notes so that if my staff needs to go  
16 into the jury room, they will not even inadvertently see any of  
17 your work in progress.

18 Just one moment. Dawn, do we have the marshal ready?

19 **THE CLERK:** Yeah, I assume it would be Chris, who is  
20 standing back there.

21 **THE COURT:** Chris, would you like to come forward.

22 A United States marshal will be outside the jury room  
23 door during your deliberations. If it becomes necessary during  
24 your deliberations to communicate with me, you may send a note  
25 through the marshal, signed by your foreperson or by one or

1 more members of the jury.

2 No member of the jury should ever attempt to  
3 communicate with me except by a signed writing. And I will  
4 respond to the jury concerning the case only in writing or here  
5 in open court.

6 If you send out a question, I will consult with the  
7 lawyers before answering it, which may take some time. I want  
8 to repeat that. If you send out a question, I will consult  
9 with the lawyers before answering it, which may take some time.  
10 You may continue your deliberations while waiting for the  
11 answer to any question.

12 Remember that you are not to tell anyone, including  
13 me, how the jury stands, numerically or otherwise, until after  
14 you have reached a verdict -- unanimous verdict or have been  
15 discharged. Do not disclose any vote count in any note to the  
16 Court. Again, do not disclose any vote count in any note to  
17 the Court.

18 Now that you are going to begin your deliberations --  
19 oh, now you are going to begin your deliberations. As  
20 mentioned earlier, you must stay until 1:00 o'clock today. But  
21 if you don't reach a verdict by the end of today then you will  
22 resume your deliberations tomorrow and thereafter.

23 The Court recommends that you deliberate from at  
24 least 8:00 a.m. to 4:00 p.m. tomorrow and thereafter, but that  
25 your schedule is up to you. You don't have to stay past 1:00,

1 unless you're available. And if you do stay past 1:00, we will  
2 arrange for a lunch to be provided to you.

3 It is very important that you let the clerk know in  
4 advance what hours you will be deliberating. That will be  
5 through a note through the marshal. It is very important that  
6 you let us know in advance what hours you will be deliberating  
7 so that the lawyers may be present in the courthouse at any  
8 time you are deliberating.

9 And I'll just pause and say the reason for that is  
10 that if you were to send out a note, we would all want to be  
11 standing at the ready to get right on it and try to answer it  
12 for you. But we need to let the lawyers have a lunch break or  
13 other breaks. So we need to know your schedule so we can  
14 conform ours accordingly.

15 You may only deliberate when all of you are together.  
16 I want to repeat that because that may not seem -- that will be  
17 easy to do something different.

18 So you may only deliberate when all of you are  
19 together. This means, for instance, that in the mornings  
20 before everyone has arrived or when someone steps out of the  
21 jury room to go to the restroom you may not discuss the case.

22 As well, the admonition that you are not to speak to  
23 anyone outside the jury room about this case still applies  
24 during your deliberations.

25 I'm almost done.

1 At this time, the marshal will identify herself.

2 Chris, what is your name?

3 **DEPUTY MARSHAL HADDAD:** Christine Haddad.

4 **THE COURT:** All right. Please raise your right hand  
5 and take the oath.

6 (Deputy marshal sworn to take charge of the jury.)

7 **THE CLERK:** Okay.

8 **THE COURT:** Thank you, Chris.

9 My final paragraph to you: After you have reached a  
10 unanimous agreement on your verdict, your foreperson will fill  
11 in, date and sign the verdict form, and advise the Court  
12 through the marshal that you have reached a verdict.

13 The foreperson should hold on to the filled-in  
14 verdict form and bring it into the courtroom when the jury  
15 returns the verdict.

16 Thank you for your careful attention. The case is  
17 now in your hands. You may now retire to the jury room and  
18 begin your deliberations.

19 **MR. VAN NEST:** Your Honor.

20 **THE COURT:** Yes.

21 **MR. VAN NEST:** Before our jurors are excused, may we  
22 approach sidebar, very briefly?

23 **THE COURT:** All right. Bear with us for one moment.

24 (The following proceedings were held at sidebar.)

25 **MR. VAN NEST:** I spoke briefly about this with

1 Mr. Jacobs, but I just want to alert the Court to the  
2 following:

3 I know you haven't made a decision on Ms. Michals,  
4 but I want to be sure that if she deliberates for Phase One  
5 that no one is later going to claim -- and then if you decide  
6 to release her for Phase Two, that no one is going to claim a  
7 Seventh Amendment problem that could affect the verdict in  
8 Phase One.

9 In other words, there are some issues in Phase One  
10 that would be interrelated with Phase Three. Speaking on  
11 behalf of Google, we would waive any such objection that would  
12 allow her to -- so we would agree not to raise such an  
13 objection even if she deliberates for Phase One and then you  
14 released her.

15 **THE COURT:** Do you agree to that, Mr. Jacobs?

16 **MR. JACOBS:** Yes.

17 **THE COURT:** All right. So does that satisfy you?

18 **MR. VAN NEST:** It does.

19 **THE COURT:** Thank you.

20 (Sidebar concluded.)

21 **THE COURT:** All right. You may now retire to the  
22 jury room and begin your deliberations.

23 (At the hour of 12:12 p.m. the jury retired to begin  
24 deliberations, and did not return to the courtroom on  
25 this day.)

1           **THE COURT:** All right. Please, be seated.

2           Are there any issues by counsel?

3           **MR. JACOBS:** Not from us, Your Honor.

4           **MR. VAN NEST:** I don't believe so, Your Honor.

5           **THE COURT:** All right.

6           Here is the drill, at this point. You need to be  
7 working with Dawn to make sure that the exhibits and the things  
8 that go into the jury room are in good order. That will go in  
9 quite quickly.

10           I am going to go back into chambers and get the  
11 slightly-conformed set of jury instructions ready to go into  
12 the jury room, along with the verdict form.

13           And I'll make sure you get copies of that, but I  
14 don't think there's any need to get you to vet that once again.  
15 You will just be given copies of what's going to go into the  
16 jury room.

17           And, then, as soon as we know the schedule, we will  
18 let you have the schedule so you can conform your own to the  
19 schedule of the jury.

20           So is all that clear, or do I need any further  
21 explanation on that?

22           **MR. VAN NEST:** I don't think so, Your Honor. I  
23 assume that you expect counsel to be present throughout  
24 deliberations. At least some counsel.

25           **THE COURT:** At least one of you have got to be in the



1 building. And Dawn should have your cell phone number so we  
2 can reach you at any time.

3 **MR. VAN NEST:** We'll do it.

4 **THE COURT:** And if there is a note, we'll call you  
5 immediately and reconvene.

6 I do have a 2 o'clock hearing in a different case  
7 that I need to -- but I will interrupt that. At any moment we  
8 get a note, I will interrupt that hearing and deal with the  
9 note.

10 All right. Anything else?

11 **MR. VAN NEST:** No, Your Honor.

12 **MR. JACOBS:** Nothing from us, Your Honor. Thank you.

13 **THE COURT:** All right. Okay. Thank you.

14 (At 12:13 p.m. the proceedings were adjourned for  
15 jury deliberations.)

16 - - - - -

17

18

19

20

21

22

23

24

25

I N D E X

	<u>PAGE</u>	<u>VOL.</u>
Preliminary Jury Instructions	2467	12
Closing Argument by Mr. Jacobs	2474	12
Closing Argument by Mr. Van Nest	2518	12
Rebuttal Argument by Mr. Jacobs	2572	12
Final Instructions	2586	12

- - - -

**CERTIFICATE OF REPORTERS**

We, KATHERINE POWELL SULLIVAN and DEBRA L. PAS,  
Official Reporters for the United States Court, Northern  
District of California, hereby certify that the foregoing  
proceedings in C 10-3561 WHA, **Oracle America, Inc., vs. Google,  
Inc.**, were reported by us, certified shorthand reporters, and  
were thereafter transcribed under our direction into  
typewriting; that the foregoing is a full, complete and true  
record of said proceedings at the time of filing.

\_\_\_\_\_  
/s/ Katherine Powell Sullivan

Katherine Powell Sullivan, CSR #5812, RPR, CRR  
U.S. Court Reporter

\_\_\_\_\_  
/s/ Debra L. Pas

Debra L. Pas, CSR #11916, RMR CRR

Monday, April 30, 2012